[No. I.]

THE

APPEAL REPORTS,

FOR 1874,

BEING

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF CEYLON

SITTING IN APPEAL.

EDITED BY

S. GRENIER, Esq.,

ADVOCATE.

VOLUME III.

Part I.—POLICE COURTS.

Part II.—COURTS OF REQUESTS.

Part. III.—DISTRICT COURTS.

COLOMBO:

"EXAMINER" PRESS, HOSPITAL STREET, FORT.

MA 5159

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PART III.—DISTRICT COURTS.

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1876.

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ne for 3 carts, and that on the 6th December by carts. I gave my Overseer a written authority me, which he was instructed to show to the toll-ber 6th I went to the toll in person, and saw 4 or ng there. The cartmen said the toll-keeper would I told the toll-keeper that the cartmen had a let them go. I have been in charge of this road frequently passed the toll, payment of which I am am I obliged to pay, so that the toll-keeper must I told the cartmen that they might go on, and not stay to see the end. I, virtually, if not in so wledged the pass given on the 6th instant as esent on the 4th instant, and believe that the carts

were detained solely on the ground of their carrying materials for building lines.

Cross-examined.—These carts are constantly employed on the roads. When I came to the toll, the bullocks were not fastened to the carts. The "lines" to be built are about 8 or 9 miles off, and are intended for coolies employed on the Matale and Dambulla road."

The following were the passes in question:—

"Pass free of Alluwihare toll 3 carts loaded with bricks, proceeding to Maduwella within 10 miles from the toll station."

(Signed.) EDW. VENNING.

Matale, 4th December, 1873.

Pelapetwella and Alluwihare tolls. Pass 5 carts free of toll transporting bricks from Matale, within 10 miles, on the upkeep of the road from Matale to Dambula.

(Signed) A. PONNAME.
Overseer, P. W. Department.

Madawella, 6th December, 1873.

The Magistrate *(Penney)* held as follows: "The Court is of opinion that the defendant has detained, both on the 4th and 6th instant, carts which were clearly exempted by the spirit of the Ordinance No. 14 of 1867. With regard to the objection raised by the Counsel for the defence (1) that the materials were for construction of "lines" and not for the repair of the road, the Court holds that the materials for constructing dwelling places for the labourers on the road are equally comprised, by the 7th clause of the Ordinance, with those used in the repair of the roads, inasmuch as the one is a necessary sequence of the other. (2) That the pass was signed by the Overseer and not by the Superintending Officer himself. It has been admitted by Counsel that the complainant informed the defendant in person that the pass produced on the 6th instant was authorised by him, and hence was virtually signed by him, and the pass on the 4th was signed by the officer himself. (3) That the pass did not specify the purpose for which the bricks were to be used. The Counsel for the defence made it one of his grounds for justifying the act of his client, *before any evidence* was adduced, that the bricks were intended to build lines with, a fact which of itself would show that his client was aware of the use to which the bricks were to be put: as that is the only object sought for by the clause of the Ordinance which requires the pass to specify the employment of the carts it enumerates, it prevents the defendants legally taking the objection after inspecting the passes in Court. The Court in addition holds that the Ordinance does not state that the use to which the *materials* are to be put must be specified in the pass, but only that the carts are employed in the repair of

the roads, which the Court considers sufficiently set forth in the passes filed in the case." The defendant was accordingly fined Rs 50.

In appeal, per STEWART, J.—"Set aside. To sustain this charge it was incumbent on the prosecutor to establish that the requisites prescribed by the 7th section of the Ordinance 14 of 1867, in order to exempt carts from toll, were duly observed. The section above referred to provides, 'that all persons, vehicles, &c., employed in the construction or repair of any road, &c., within ten miles of the Toll Station, &c., shall pass without payment of Toll, on production of a certificate of such employment from the Officer superintending the work or survey.' Neither of the documents produced meets the enactment. The pass dated 4th December does not state nor certify that the carts were "employed in the construction or repair of any road," and the pass of the 6th December, though fuller than the other, and meeting the requirements of the Ordinance in so far that it expressly states that the carts were "transporting bricks from Matala and within ten miles on the upkeep of the road from Matala to Dambulla," is wholly inoperative, the document being signed by an Overseer, and not, as it ought to have been, by the Superintending Officer. The Magistrate remarks that the Superintending Officer "informed the defendant in person that the pass produced on the 6th instant was authorized by him, and hence was virtually signed by him." There is however no proof that any of the carts were detained subsequent to the acknowledgment of the pass by the complainant, nor is the Supreme Court prepared to hold that what may be deemed equivalent can legally be substituted for that which is expressly required by Ordinance. Besides, it is obvious that there are good and salutary reasons for the certificate being complete in itself."

Complainant bound to point out his witnesses.

P. C. Galagedera, 19646. The defendants were charged with disorderly conduct. Summons and subpænas on behalf of the complainant issued on the 3rd December, and were made returnable on the 8th of January. On the 18th of December, the Fiscal made a return to the effect that the process-server had not been able to serve the subpænas as the witnesses were not known to him, and that they required to be pointed out. On the case being called on the 8th of January, the complainant moved for a postponement on the ground that some of his witnesses had not received their subpænas. The Magistrate ***(Dunlop)***, however, refused the application in the following terms: "Not allowed: as it seems to me, it is a trivial case and only brought through spite." The trial of the case proceeded, and the accused were found not guilty, the complainant being condemned to pay their expenses.

In appeal, per STEWART, J.—"Affirmed. It was the duty of the complainant to point out his witnesses to the Fiscal's officer."

Gambling. Jurisdiction.

P. C. Matara, 72597. This was an appeal against a conviction by the Magistrate (*Jumeaux*), under the 19th clause of the Vagrant Ordinance, the defendant having been tried without a certificate from the Queen's Advocate, and sentenced to pay a fine of Rs. 50, and to be imprisoned at hard labor for six months. (*Browne* for appellant.) Per STEWART, J.—"Set aside, and proceedings quashed. The punishment prescribed by the 19th section of Ordinance 4 of 1841, under which this plaint is laid, places this case beyond the jurisdiction of the Police Court without a certificate from the Queen's Advocate, as provided by the 99th section of Ordinance 11 of 1868. See judgment of Supreme Court in P. C. Colombo, 5400, Grenier's Reports, 1873, p. 23. Also P. C. Pantura, 21181, *Ibid*, p. 52. There is no certificate from the Queen's Advocate in the proceedings."

Possessing stolen cattle.

P. C. Galle, 87204. The defendant was charged with having had in his possession at Ettillegodde a stolen she-buffaloe "without being able to produce a written receipt for the same, in breach of the 21st clause of the Ordinance No. 14 of 1859." It appeared from the evidence that the defendant had produced a receipt, in which the brand-marks were described as certain *Tamil* characters, whereas the animal in question was branded in *Singhalese*. The Magistrate (*Lee*) convicted the accused, holding that "the receipt produced did not apply to the buffaloe in question," and sentenced him to fifteen days' hard labor.

In appeal, (*Grenier* for appellant) per STEWART, J.—"Set aside. There is no evidence at all that the buffaloe referred to in the plaint was stolen. The section of the Ordinance under which the charge is laid relates to the possession of *stolen* cattle."

January 27.

Present STEWART, J.

Previous convictions should be duly proved.

P. C. Matale, 5519. Fifteen defendants were charged with gambling under the Vagrant Ordinance. Ten of them, having been tried and convicted, were severally sentenced by the Magistrate (*Penney*) to pay a fine of Rs. 50 each, excepting two who were sentenced to hard labor in the following terms: "the 2nd and 3rd, having been previously convicted of this offence in P. C. 42317, are deemed 'incorrigible rogues' and sentenced to four months' hard labor."

In appeal, per STEWART, J.—"Altered by the sentence on the 2nd and 3rd defendants being changed into a fine of Rs. 20. The decision is in other respects affirmed. The previous conviction of these two defendants ought to have been proved."

Labor Ordinance.

P. C. Matale, 5558. The defendant, a kangany, was charged by the complainant (*Tucker*) with gross neglect of duty and disobedience of orders. It appeared from the evidence that, on the 3rd of December last, the accused had been ordered after the day's work to watch the store all night, being promised a holiday on the morrow, and that he had refused to do so, never having acted as a watcher before. The Magistrate (*Penney*), having held that the order in question was a reasonable one, and that no justification was proved for the defence, convicted the defendant, and sentenced him to one month's hard labor.

In appeal, (*Grenier* for appellant), per STEWART J.—Affirmed.

False and frivolous prosecution.

P. C. Kandy, 96533. The plaint in this case was as follows:—"That the defendant did on the 19th day of November, 1873, at Kandy, institute the Kandy Police Court case, No. 96472, on false frivolous or vexatious grounds, in breach of the 106th clause of Ordinance 11 of 1868." On the returnable day of the summons, the Magistrate (*Pennycuick*) ordered the case to be struck off in the following judgment. "No case I think lies under the clause, which applies only to action taken by the Magistrate at the time of hearing the case said to be false. In the case in question, (No. 96472) the plaint was withdrawn by complainant, and no application was apparently made by the defendant, who might then have possibly obtained his remedy under the Ordinance."

In appeal, per STEWART, J.—"Affirmed for the reasons given by the Magistrate."

Vagrant Ordinance. Adultery a crime.

P. C. Panadure, 22247 The plaint in this case was: "That the defendant abovenamed was, on the night of the 29th instant, found in the premises of the complainant without being able to give a satisfactory account of himself, in breach of the 6th section, 4th clause of the Ordinance No. 4 of 1841."

The complainant's evidence was to the following effect.

"I on several occasions warned the accused not to come to my house, and so did the headman. I also complained to the Court. On the day in question, I left my house about nine at night, my wife was at home. I returned about five in the morning and found the accused inside the house. I found him in my wife's room. I seized him and raised an alarm, several persons came. The headman also was called, and I gave the accused in charge to the headman."

The Magistrate (*Ellis*) held as follows: "In this case I think it has been proved that accused went to complainant's house on the night in question with the object of committing adultery with complainant's wife. The question therefore arises whether he was in the house with an unlawful purpose within the meaning of the Ordinance. It is the unlawfulness of the purpose alone which can render accused punishable; if the purpose be not unlawful, his mere presence in the house constitutes no crime. Now if accused had committed adultery with complainant's wife in his (accused's) own house, he would not have been liable to any criminal action, and the mere fact that the act was performed in complainant's house in no way alters its nature. If adultery be a legal crime at all, it is a crime no matter where it is committed; if it be not a crime, the fact that it was committed in complainant's house is not sufficient to make it one. I therefore hold that the simple commission of adultery, no matter in whose house, is not a legal offence. And if this be so, accused was not in the house with the object of committing a legal offence: he therefore was not there for an unlawful purpose. It is the unlawfulness of the purpose which alone renders accused's presence illegal. It cannot therefore be argued that accused's presence in the house makes the purpose unlawful; but it would not have been unlawful any where else. I therefore hold that it is not unlawful there. The circumstances as detailed by the witness Radoris and by complainant himself, rendered it unnecessary to demand from accused any account of himself: no sane person could doubt what his purpose was. The question of whether accused could give a satisfactory account of himself, therefore, depends on whether his purpose was lawful, as I consider it clearly established that he came for the purpose above mentioned and no other. It must also be recollected that there is a very strong presumption indeed that he came at the request of the mistress of the house. Accused is acquitted."

In appeal, per STEWART, J.—"Set aside and judgment of guilty entered. It is further adjudged that the defendant be imprisoned at hard labor for three weeks. Adultery is undoubtedly a crime according to the Roman Dutch Law. See Vanderlinden, p. 353. If therefore the defendant was seized in the complainant's house, he having come there with the view of committing adultery with the wife of the complainant, as has been found by the Magistrate, it follows that the defendant was in the house for an unlawful purpose. It is clear, moreover, independently of any unlawful purpose, that the defendant, when apprehended in the prosecutor's premises, was unable to give any satisfactory account of himself."

January 29.
Present STEWART, J.

False information.

P. C. Galle, 87140. The plaint in this case was as follows: "That the defendant did, on the 16th day of December, 1873, at the Police Station, Galle, wilfully give false information to the complainant, an officer of Police, with intent to support a false accusation, to wit, that the woman Lokuhami was a prostitute, and that he had contracted a venereal disease from her, with a view to subject her to the provisions of the Ordinance No. 17 of 1867, in breach of the 166th clause of the Ordinance No. 11 of 1868." The complainant, who was a Police Inspector, deposed that the accused had not told him that the woman was a common prostitute. The woman herself, being affirmed, stated that she lived in the town of Galle, at "China garden," and had a husband; that she had been examined by two Doctorsand then discharged. The husband, however, was not called as a witness, but Dr. Meier proved that the woman was not venereally affected. The Magistrate (*Lee*) found the accused not guilty in the following terms: "The infecting of a person with venereal disease is no offence under Ordinance No. 17 of 1867, nor is the being a common prostitute any offence thereunder. (I say nothing of the common law.) There is no dedaction from the fact of the woman having a venereal disease that she is a prostitute, far less a common prostitute. I hold that the information given, though false, was not given to support a false accusation."

In appeal, (*the Queen's Advocate* for appellant) per STEWART J.—"Set aside. The Magistrate finds that the information given by the defendant to the Inspector of Police was false. The question for consideration is, whether the false charge made by the defendant falls within the 166th clause of the Ordinance 11 of 1868. Having regard to the nature of the information and that it was given to an Officer of the Police, it is obvious, and it would appear to have been so received by the complainant, that the defendant intended to and did in fact substantially charge the woman referred to with being a common prostitute. Further, in consequence of the charge, the woman was subjected to medical examination under the provisions of the Contagious Diseases Ordinance. That Ordinance certainly does not in express terms enact any substantive punishment for common prostitutes. But undoubtedly it does subject such women to being called upon to appear before the Police Magistrate, as well as to the degrading liability of personal examination. A charge entailing such serious consequences cannot be regarded otherwise than as an accusation within the meaning of the clause of the Administration of Justice Ordinance, under which the plaint is laid: the very coercion of the woman, and

her deprivation of liberty, independently of the infamy attaching to the charge, being in themselves in the nature of, if not in effect, penal liabilities. There can also be no doubt that to charge a woman with being a common prostitute, is to accuse her of a criminal and punishable offence, according to the Roman Dutch Law. See Vanderlinden, p. 356. It is adjudged that the defendant is guilty, and that he be imprisoned and kept to hard labor for six weeks."

Costs. Contempt.

P. C. Panadure, 21858. This was a charge of assault. The complainant having in the course of the trial abandoned the case, the defendant was discharged, and the Police Magistrate (*Ellis*) cast the plaintiff in costs (Rs. 15), and further sentenced him on the following day, (after duly calling on him to shew cause), to pay a fine of Rs. 10, for bringing a false and frivolous charge, and an additional fine of Rs. 10 for prevarication. *In appeal*, per STEWART, J.—Affirmed.

Labor Ordinance.

P. C. Trincomalie, 23985. The plaint was: "that the defendant, being a goldsmith, did unlawfully appropriate to himself $3\frac{1}{4}$ pagodas' weight of gold of the quantity given to him in the month of May 1873, to make a certain jewel, and neglect to complete the same as agreed before, in breach of the 11th clause of the Ordinance 11 of 1865." The only evidence in the case was that of complainant who stated—

"In May I gave defendant 8 pagodas of gold to make jewels for my child. He commenced the work but did not complete it, and then went and pledged the gold to a third party. I pressed him for the gold, and with great difficulty he redeemed the pledge—he then gave me this which is a part of a gold necklace. I weighed and found it weighed only $4\frac{1}{4}$ pagodas, $3\frac{3}{4}$ pagodas were missing. I asked him several times for the balance to be completed, since October, but he fails to do the work, or to return me the jewelry. He agreed to make the ornament called *Kodi*. He has not offered to make good the gold deficient or to complete the work. The defendant was not ill."

The defendant called no witnesses, but stated "I was ill, so the work was not completed." The Magistrate (*Templer*) held as follows. "This trick of goldsmiths is getting very common in Trincomalie, and the defendant must be made an example of. He is sentenced to six weeks' hard labor, and the wages due to him are forfeited."

In appeal, per STEWART J.—"Set aside. The defendant in this case is a goldsmith, who undertook to make some articles of jewelry for the complainant, but neglected to perform his contract. He was not in the service of this complainant, either as a servant or journeyman artificer, so as to render him punishable for negligence under the Laborers' Ordinance No. 11 of 1865."

February 10.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Security to keep the peace.

P. C. Matara, 72773. The plaint charged the defendants with assault. The Police Magistrate (*Jumeaux*) found them guilty and fined them each Rs. 20. He further bound over both parties to keep the peace, on the ground that the complainants had provoked the assault.

In appeal, per STEWART, J.—"Set aside in so far as the defendants are required to give security to keep the peace. In other respects the judgment is affirmed. Accused parties before the Police Court, except in cases which come under the 226th clause, are not liable to be fined as well as to be bound over to keep the peace. Under the 104th section of the Ordinance 11 of 1868, a Magistrate can only require parties to find security to keep the peace where he inflicts no other punishment."

Contagious diseases Ordinance.

P. C. Galle, 87121. The plaint was as follows:

(1) "That the defendant abovenamed, being the owner of a house at China garden and having reasonable cause to believe Punchihamy is a common prostitute and affected with a contagious disease, suffered and still suffers the said woman to resort or otherwise to live in his said house for the purpose of prostitution, in breach of the 26th clause of Ordinance 17 of 1867;

(2) "That the defendant did at the place aforesaid, on the 18th December aforesaid, unlawfully keep and maintain a certain common ill-governed and disorderly house, and in the said house for the lucre and gain of him the said defendant did suffer, cause and procure certain men and women of evil fame and repute and dishonest conversation to come together and assemble on divers occasions, and on such occasions to remain drinking, tippling, whoring and misbehaving themselves, to the common nuisance and great damage of the liege subjects of our Lady the Queen and against the peace of our Lady the Queen, her Crown and dignity."

The Magistrate (*Lee*) found the defendant not guilty on both counts in the following judgment: "On the count framed on the Ordinance, it was necessary to prove that the defendant was cognizant of facts which gave him reasonable ground to believe the woman to be venereally affected. Of this there is no proof. On the common

Contagious diseases Ordinance.

law count there is a decision in point, (Reg. v. Stannard,* 33 L. J. (M. C.) 61) and the defendant cannot under that be convicted."

In appeal, *Kelly*, for appellant. It was proved that the defendant lived about 75 fathoms from the house in question; that the woman Punchihamy, who was his tenant, was notoriously a prostitute; that she had been treated in hospital for a venereal disease and discharged at the end of December; and that the defendant had been seen going to her house two or three times in the early part of that month. These were facts from which a jury might reasonably infer that the defendant knew that Punchihamy was diseased. It was extremely difficult to secure direct evidence in such cases.

Per CREASY, C. J.—"Affirmed. We feel bound by the authority of the English case cited in the judgment."

Game preservation Ordinance.

P. C. Ratnapura, 14268.—This was an appeal against a conviction under section 1, clause 11 of the Game Preservation Ordinance 6 of 1872. (*Ferdinands* and *Layard* for appellant.)

Per CAYLEY, J.—"Set aside and verdict of acquittal entered. It is not alleged in the plaint nor proved by the evidence that the animal was killed during a season which had been declared *close* by notification in the Government Gazette. Indeed, it was admitted at the hearing of this appeal that no such notification had been published."

February 13.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Power of Municipal Councils to remove Small-pox patients.

P. C. Colombo, 11764. The defendants were charged, under clause 75 of Ordinance 16 of 1865, with having resisted and obstructed the Police in the execution of a warrant for the removal of a Small-pox patient to the hospital. The resistance and obstruction were duly proved, but the acting Magistrate (*S. Grenier*) held the warrant illegal and acquitted the accused in the following judgment:

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* The prisoner, being the owner of a house, let out the different apartments in it separately to young women who, to his knowledge and with his consent, used them for the purposes of prostitution. They were merely weekly tenants. The prisoner when he let the rooms knew of the purposes to which they would apply them, and fully assented thereto, but he received no share of the earnings of the women. He did not live in the house, and he only went there to collect his weekly rents. He had no other control over the tenants than arose from his power as landlord to determine the tenancies:—*Held*, that he could not be indicted for keeping a disorderly house. [Crown case reserved by Cockburn, C. J., and argued before Pollock, C.B., Wightman, J., Williams, J., Channell, B., and Mellor, J.]

Feb. 13.

Power of Municipal Councils to remove Small-pox patients.

"The defendants are charged with having resisted and obstructed the Police in the execution of their duty. The complainant (a Police Inspector) has produced a warrant addressed to him, signed by the Chairman of the Colombo Municipality, and directing the removal of a Small-pox patient from a house in Hettiawatte to the Small-pox hospital. The Court is aware that the Municipal Councils have been authorized by Regulations proclaimed by the Governor on the 11th July, 1873, (vide *Gazette* of the 12th July,) under the Ordinance 8 of 1866, to order the removal in certain cases of Small-pox patients to some public hospital or other place provided by Government. But in view of the provisions of clause 185 of the Municipal Councils' Ordinance, No. 17 of 1865, and in the absence of any resolution, bye-law or record to shew that the Chairman was duly authorized to sign on behalf of the Council, I hold this warrant illegal. The complainant has had time from the 19th instant to produce such authority. He now states he is unable to do so. As the law stands the Chairman is unable to enter into a civil contract on behalf of the Council or to issue a single process from the Court of the Bench of Magistrates without two other Councillors acting with him. In the present instance, the power sought to be exercised is much larger than the authority involved in signing a contract or issuing a mere subpœna or summons; and however much I regret having to acquit the accused, who have been proved to have acted in defiance of the Police and of an order which the circumstances of the case fully justified, I am bound to hold the warrant illegal and acquit the defendants. The defendants are accordingly found not guilty and are discharged."

In appeal, per Cayley, J.—"Affirmed. In the absence of any proof either way, the authority of the Chairman to issue the order in question might probably have been presumed; but there is actual proof that he had no such authority."

February 17.

Present Creasy, C. J., Stewart and Cayley, J. J.

Game preservation Ordinance.

P. C. Ratnapura, 14253. The defendant was charged, under Ordinance 6 of 1872, with having shot an elk during the close season. *In appeal,* against a conviction by the Magistrate (*Neville*), per Cayley J.—"Set aside. No close season was declared by proclamation in the Gazette until lately,—after the commission of the alleged offence. See decision of the Supreme Court dated 10th February, 1874, P. C. Ratnapura, No. 14268."

Possession of stolen cattle.

P. C. Galagedera, 19552. The defendant was charged, in a plaint filed on the 4th November, 1873, with having been in possession of a stolen buffaloe on the 26th June, 1872, in breach of the 21st clause of Ordinance 14 of 1859. The Magistrate (*Dunlop*) found him guilty and sentenced him to three months' hard labor.

In appeal, per CAYLEY, J.—"Set aside and verdict of acquittal entered. The prosecution was not commenced within three months from the commission of the alleged offence, as required by the 24th clause of the Ordinance 14 of 1859."

February 20.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Evidence should be duly recorded.

P. C. Colombo, 12277. This was an appeal against a conviction by the acting Magistrate (*Alwis*) on a charge of theft. The only evidence recorded was that of the complainant, but in forwarding the appeal to the Supreme Court the Magistrate appended the following explanatory note to his judgment: "Before I convicted the defendant I enquired into the case fully from other witnesses present, but did not record the evidence, as I believed the complainant's evidence. I would have allowed a postponement if an application was made. I have no objection to the case being sent back."

Per CREASY, C. J.—"Set aside and case sent back for rehearing. The Police Magistrate's proceedings, in making inquiry from witnesses without recording their evidence, were seriously irregular. They were in direct opposition to the Rules and Regulations for Her Majesty's Colonial Service, which order, in Rule 406, Chapter XVI, as follows: "No judge presiding on a criminal trial, must upon any account fail to take notes of the evidence adduced."

February 24.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

False information. Husband and wife.

P. C. Matale, 5621. This was a charge against a married woman for having given false information to a Justice of the Peace, in breach of the 166th clause of Ordinance 11 of 1868. It appeared that the accused had filed a P. C. plaint, charging the complainant with assault, and that, having affirmed that a summons could not be served, she had secured a P. C. warrant for his apprehension. It was proved at the trial of this case that the defendant's husband had inflicted a cut on her forehead with a knife, and that both husband and wife had immediately after gone to the Aratchy of the village and accused

False information. Husband and wife.

the complainant and another of the assault. The Magistrate (*Penney*) convicted the defendant and sentenced her to pay a fine of Rs. 50 and to be imprisoned at hard labor for one month.

In appeal, *Grenier* for appellant. The law would presume, under the circumstances of the case, that the accused had acted under the coercion of her husband, and there was no evidence to rebut such presumption. Further, the charge would not come within the operation of the 166th clause, as the affirmation in question had been made before a Magistrate and not a J. P. and that only for the purpose of obtaining a particular form of process. The false information, if any, had been given in the plaint and had formed the subject of adjudication in the Police Court.

Per STEWART, J.—" Set aside and judgment of not guilty to be entered. The defendant in this case is a married woman, and it being proved that the complaint to the Aratchy was made in the presence of her husband, the presumption arises that she acted under his influence and coercion. This presumption of law is not rebutted, but rather strengthened, by the evidence of Rang Naida as well as that of the Aratchy. The interpretation clause of Ordinance 11 of 1868 clearly shows that a Village Peace Officer, such as a Gan Arachi, is an officer of Police within the meaning of the 166th clause."

February 26.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Bribing the Police.

P. C. Kandy, 97116. The plaint was " that the defendant did, on the 17th of January, 1874, at Kotabogodda, bribe the complainant, a police officer, by giving him Rs. 5 when in the execution of his duty, in breach of the 60th clause of Ordinance 10 of 1844." The evidence disclosed that the prosecutor, who was a Police constable, had detected the illicit sale of arrack at defendant's house, and that the accused while in custody had offered the bribe in question. The Magistrate (*Pennycuick*) found the defendant guilty, but expressed some doubt as to his jurisdiction, notwithstanding the Queen's Advocate's certificate empowering him to entertain the charge.

In appeal, per STEWART, J.—" Affirmed. The latter part of the 60th section of the Ordinance 10 of 1844 must be taken in connection with the preceding part of the clause. The offence charged being for a breach of the Arrack Ordinance, an enactment made for the protection of the revenue, and the Queen's Advocate having certified that he is content that the case should be presecuted before the Police Court, that Court had jurisdiction to deal with the charge under the 99th section of Ordinance 11 of 1868."

Gambling. Charge. prescribed.

P. C. Matara, 72597. The proceedings in this case (which are reported in page 4) having been quashed on the ground of the Magistrate's want of jurisdiction, the complainant obtained the necessary certificate from the Queen's Advocate and filed a fresh plaint on which the defendant was convicted.

In appeal, (*Layard* for the appellant) per Stewart, J.—" Set aside and judgment of acquittal to be entered. The proceedings in this case were quashed by this Court on the 20th January last, rendering thereby all proceedings therein in the Police Court prior to that date, including the plaint, null and void. The present plaint though purporting to be filed on the 29th October, within two days of the commission of the offence (27th October) as laid in the charge, appears in fact not to have been presented to the Police Court until the 4th February, more than three months subsequent to the alleged offence. The evidence moreover adduced at the second trial in support of the new plaint is only in relation to the period referred to in both charges, and does not in any way shew that the defendant kept a place for the purpose of common and promiscuous gaming at any time within one month previous to the 4th February, the date of the institution of the present charge. By the 22nd clause of Ordinance 4 of 1841, for a breach of the 19th clause of which this plaint is laid, no prosecution can be maintained against any person under any of the provisions of that Ordinance unless the same is instituted before the expiration of one calendar month next subsequent to the date of the offence."

March 3.

Present Creasy, C. J. and Stewart, J.

Game Ordinance.

P. C. Kalmunai, 2240. Four defendants were charged under the 1st and 6th sections of the 11th clause of the Game Preservation Ordinance 6 of 1872. The Magistrate (*Hume*) convicted the 1st defendant under both sections and the rest under the 6th section and sentenced them as follows:- " 1st accused to pay Rs. 25 on each count; 2nd, 3rd and 4th to pay a fine of Rs. 25 each ; Rs. 20 to informer if not exceeding half recovered."

In appeal, per Stewart, J.—" Amended by the fine upon the 1st defendant for killing game being increased to Rs. 50. The fine upon the 1st, 2nd, 3rd and 4th defendants for being found in possession of game to be altered into one fine of Rs. 25 upon all the defendants. The 1st section of the 11th clause of Ordinance 6 of 1872, which deals with the offence of killing game during the close season, leaves the Court no discretion in regard to the amount of fine, that clause enacting that the offender ' shall be liable to

a fine of Rs. 50.' The 6th section is different, any person found in possession of meat of game being made liable 'to a fine not exceeding Rs. 50,' and consequently punishable in the discretion of the Court up to that sum. The defendants having been proceeded against under this clause for a joint offence and found guilty as joint offenders, the punishment should only be as for one offence. The judgment is affirmed as to the share awarded to the informer." Game Ordinance.

P. C. Colombo, 13076. The defendant, who was a British seaman, was convicted under the 73rd clause of the Merchant Seamen's Ordinance (No. 7 of 1863) of an assault on his superior officer and sentenced by the Magistrate *(Fisher)* to imprisonment at hard labor for two weeks. Merchant Seamen's Ordinance.

In appeal, the judgment was affirmed; and per STEWART, J.—" This being an offence of which the Police Court would have had cognizance if committed within the limits of its ordinary jurisdiction, the Act 18 and 19 Vict., c. 91, sec. 21, empowers the Police Court, the prisoner being found within its jurisdiction, to hear and try the case as if such offence had been committed within its limits."

P. C. Balapitimodera, 44652. This was a charge of theft. The defendants having failed in a counter case which they had brought against the complainant for assault, the Magistrate (*Gibson*) convicted the accused and sentenced them to one month's hard labor each, holding that " though the evidence for the complainant is weak, the defendants have not proved that they did not commit the theft charged and have not attempted to prove any *alibi*, and their counter case has utterly failed." Irregular conviction.

In appeal, per CREASY, C. J.—" Set aside. It is evident from the judgment that the Police Magistrate considered the proof for the complainant too weak to sustain a conviction. This is not a case in which evidence is adduced on the other side disclosing facts such as make the proof of guilt sufficient. The defendants have merely failed in a counter case."

P. C. Jaffna, 4084. The plaint was " that the defendant did, on the 16th instant, at Anecottah, sell toddy in her dwelling garden without the required permit, in breach of the Ordinance 10 of 1844, clauses 39, 40 and 46." The defence was that the accused had sold on behalf of her husband, who had a license, during his illness. The acting Magistrate (*Thwaites*), however, Arrack Ordinance. A wife may sell on behalf of her husband.

Arrack Ordinance. A wife may sell on behalf of her husband.

convicted the woman in the following terms: "I am inclined to think that the fact of a husband having a license is no cover to a wife when selling toddy in the husband's absence. The prisoner is found guilty and is sentenced to pay a fine of Rs. 20. This fine is made heavier than it would have been, if she had not allowed men to get drunk in her house. If the sale was untrue, these men would certainly have been called for the defence."

In appeal, per CREASY, C. J.—"Set aside. This woman was clearly within the protection given by the 26th clause of Ordinance 10 of 1844."

March 10.

Present CREASY, C. J. and STEWART, J.

Striking off cases.

P. C. Matara, 72852. The defendants were charged with assault and maliciously injuring complainant's property. After several postponements, the case came on for trial on the 28th February, 1874. The complainant, while under cross-examination, having admitted that a previous prosecution against the same parties and in respect of the same offence had been struck off and that he had not obtained the permission of the Court to reinstitute the charge, the Magistrate (*Jumeaux*) made order as follows: "For complainant it is contended that the meaning of the word 'dismissed' [in clause 5 of Ordinance 18 of 1871] is dismissed after evidence has been entered into, and that the former case was not 'dismissed' but 'struck off' in complainant's absence. In view of the circumstances under which the former case was struck off, I grant the complainant permission to bring a fresh case and dismiss this case on the ground that complainant had not obtained express sanction from the Magistrate."

In appeal, per CREASY, C. J.—"Affirmed. The words of clause 5 of Ordinance 18 of 1871 are general and apply to a case like the present. One of the mischiefs which the Ordinance was intended to check was the system of bringing men from their homes to the Police Court repeatedly on false charges and not appearing against them."

Disorderly conduct.

P. C. Galle, 87803. The plaint was as follows:

"That the defendant did, on the 23rd February, 1874, at Magalla, behave in a disorderly manner in the public street, in breach of the 2nd clause of Ordinance 4 of 1841; and (2) that he was on the day and at the place aforesaid guilty of conduct tending to a breach of the peace."

It appeared from the evidence that the accused made use of very indecent language at the complainant while driving past in a car-

riage. The Magistrate (*Lee*) convicted the defendant on both counts and sentenced him to seven days' imprisonment. Disorderly conduct.

In appeal, per STEWART, J.—" Amended by the defendant being found guilty of disorderly conduct on the first part of the charge and sentenced to pay a fine of Rs. 5. The conviction and sentence of imprisonment under the second count are set aside. Though the language made use of by the defendant was very disgusting, it does not appear from the evidence that the abuse was intended, or meant, or that there was any endeavour on the part of the defendant (who was driving past at the time), to provoke the complainant to commit a breach of the peace, proof whereof was essential to render the defendant criminally liable under the latter part of the plaint. See Chitty's Criminal Law, vol. 3, p. 849."

Costs.

P. C. Galle, 87434. The complainant in this case having been condemned to pay Rs. 10 as costs, the fine was reduced, *in appeal,* to R. 1; and per STEWART, J.—" There is no proof of actual cost being incurred; and the utmost that should be given is a moderate sum for expenditure of time and trouble in attending the Court."

Assault. Gansabawe.

P. C. Matale, 5712. The plaint charged the 1st and 2nd defendants with having assaulted the complainant and snatched from him Rs. 5, and the 3rd defendant with having aided and abetted the others in committing the offence. The Magistrate (*Penney*) having referred the complainant to the Gansabawe, on the ground " that the prosecutor had been struck with the open hand," the order, *in appeal,* was affirmed by STEWART, J.

Cattle trespass.

P. C. Panwila, 14774. This was a charge of cattle trespass under clause 2 of Ordinance 2 of 1835, the damage claimed by complainant being laid at Rs. 375 as assessed by the village headman and three assessors. The Police Magistrate dismissed the case on the ground of insufficiency of evidence.

In appeal, per STEWART, J.—" Set aside and case remanded for further hearing and consideration. The Magistrate does not state that he disbelieves the evidence. If the witnesses are believed, they prove that one of the trespassing animals belonged to the 1st defendant, who should therefore be held responsible for such proportion of the damage as it may be fairly inferred that his cow contributed to occasion. The damages as assessed by the Aratchy certainly seem exorbitant. But the Magistrate may fix upon such

Cattle trespass.

amount as he may think just and reasonable. Even if, however, no damage be proved, the 1st defendant, as the owner of one of the trespassing cattle, will be liable to a fine not exceeding five rupees under the 4th section of the Ordinance."

Receiving with guilty knowledge.

P. C. Newera Eliya, 8990. The defendant, who was a boutique keeper, was charged with having received about three and a half measures of coffee from the Dunsiane Estate, knowing the same to have been stolen. It was proved that the coffee in question had been sold by three Estate coolies to the accused, who, however, when taken up on a warrant, stated to the arresting officer "that he had bought the coffee from a woman, and that if he had known it was the Master's coffee he would not have purchased it." The Magistrate *(Hartshorne)* dismissed the case in the following terms: "there is no evidence to prove guilty knowledge on the part of the defendant, nor is there any evidence from which such guilty knowledge can be reasonably inferred."

In appeal, per CREASY, C. J.—"Set aside and judgment of guilty to be entered and defendant is sentenced to three months' imprisonment with hard labor and to pay a fine of fifty rupees. In this case the Police Magistrate states, as the reason for acquitting, not that he disbelieves the evidence, but that 'there is no evidence to prove guilty knowledge.' This makes the question one of law on which we can adjudicate. In our opinion there *is* legal evidence, and there is abundant evidence, to prove guilty knowledge in the receiver: the defendant received the coffee from men whom he knew to be Estate coolies, and whom he therefore knew to be men with ample opportunities for stealing coffee, and men not in the least likely to be growers of coffee or honest dealers in coffee. Further, when the defendant is arrested on this charge, he tells a lie about the coffee, and tries to make it believed that he got it not from estate coolies but from a woman."

March 17.

Present CREASY, C. J.

Timber Ordinance.

P. C. Matale, 4568. The defendant was charged with having cut timber on crown land, in breach of Ordinance 24 of 1848. It was uncertain from the evidence whether the land in question belonged to Punchiralle, one of complainant's witnesses, or to the Government, but the Police Magistrate (*Penney)* convicted the accused and fined him Rs. 50.

In appeal, per CREASY, C. J.—"Set aside and case sent back for further hearing. The witnesses whom defendant had ready

should have been heard. If he cut the tree by Punchiralle's authority or order or for a valuable consideration paid for it, the case would seem to be one in which the defendant acted under a bona fide claim of right, although it may have been erroneous. On the other hand, the circumstances under which defendant and Punchiralle agreed that defendant should cut the tree may have been such as to show that they both knew that a fraud on the Crown rights was intended."

Timber Ordinance.

Removing goods in the custody of the law.

P. C. Kandy, 97307. This was an appeal against a conviction by the Magistrate (*Pennycuick*) under the 23rd clause of Ordinance 4 of 1867, for resisting and obstructing a Fiscal's officer in the execution of his duty.

Per CREASY, C. J.—" Set aside. The defendants may be punishable for taking away goods while in the custody of the law, but they did not obstruct this complainant. See case P. C. Colombo, 31707, reported in Grenier's Reports for 1872, page 3. There is a misprint in the 5th line from the end of that case : the word *received* ought to be *removed*."

Inducing to steal.

P. C. Dickoya, 3. The plaint was as follows :

"That the defendant did, on the 22nd day of February, 1874, induce or attempt to induce the Store coolies of the complainant to sell coffee to the defendant by offering them (the coolies) two rupees as a bribe."

The Magistrate (*Temple*) found the defendant guilty and sentenced him to three months' hard labor.

In appeal, the conviction was quashed ; and per CREASY, C. J.—" The plaint discloses no legal offence. The defendant ought to be proceeded against for an attempt to induce the coolies to steal the coffee."

March 23.

Present CREASY, C. J.

Forcible entry and removal.

P. C. Kurenegala, 23299. The plaint was

"that the defendants did, on the 16th and 17th October last, without the authority of a competent Magistrate, forcibly and unlawfully enter into the complainant's house and remove therefrom the following property of the complainant whilst in his possession, pretending a right thereto, in breach of the Proclamation of 5th August, 1819." [Here followed a list of the property referred to.]

The acting Magistrate *(de Livera)* gave judgment as follows : " If there was any forcible removal of the paddy, 1st defendant alone is to be held responsible for it. The 2nd, 3rd, 4th and 5th defendants appear not to have used any force at all, and in fact

Forcible entry and removal. do not claim the paddy. 1st defendant, it appears, sets up a claim to a portion of complainant's father's lands by right of his (1st defendant's) mother who, he says, was married in beena. This is denied by complainant and his mother. The 2nd, 3rd, 4th and 5th defendants are adjudged to be not guilty."

In appeal, per Creasy, C. J.—"The judgment is affirmed so far as it adjudicates on the case. In this case the Police Magistrate has not adjudicated at all respecting the 1st defendant. He has acquitted the others for reasons, apparently, with which I do not agree; but the acquittal must stand affirmed, as the case does not in my judgment come within the proclamation of 5th August, 1819, under which alone the plaint is laid. That proclamation was designed to deal with two classes of offences; the first class includes the offence of violent and forcible possession of land while occupied by another person, and the offence ot violently and forcibly taking the crops of such land while such land is so occupied. In the next place, the proclamation deals with an offence common among the Kandyans at its date, of a man forcibly seizing the goods of another, not because he claims those goods, but by way of reprisal for some previous injury, or by way of material guarantee for the satisfaction of some claim. There ought to have been a count for assault, and it is still open to the complainant to prefer a charge for assault."

Maintenance. *P. C. Negombo*, 29055. On this case (which is reported in II *Grenier* (P. C.) p. 112) being reheard by the Magistrate (*Liesching*), the accused was fined only 25 cents, in consideration of his having, previously to the trial, tendered sufficient maintenance money. The complainant appealed.

Per Creasy, C. J.—"Appeal rejected. This is an attempt to appeal against a sentence as not sufficiently severe."

Contempt. *P. C Kalutara*, 49743. The defendant, who was charged with assault, being absent on the day of trial (17th February), the Magistrate (*Power*) issued a warrant, under which he was brought up on the 5th of March. He then excused his previous absence by pleading that he had been suddenly called away to Negombo; but the excuse was held insufficient, and the defendant was fined Rs. 2·50, for disobeying the summons of the Court.

In appeal, per Creasy, C. J.—"Set aside. The propriety of fining defendant according to the 107th section of Ordinance 11 of 1868 as well as taking him up under a warrant according to section 15 of Ordinance 18 of 1861 is very questionable. Certainly it

ought not to have been done without giving the defendant a fair opportunity of proving his excuse." Contempt.

April 2.

Present CAYLEY, J.

Labor Ordinance.

P. C. Matara, 72636. The defendant, who was a toddy-drawer, was charged with misconduct and leaving service without notice, in breach of clause 11 of Ordinance 11 of 1865. The Magistrate (*Jumeaux*) acquitted the accused in the following terms: "Complainant admits that the contract or agreement for defendant to work for 10 months was a verbal agreement, and that no written contract was entered into: such agreement or contract is not binding or legal. The defendant not being paid a daily or monthly rate of wages, but getting a percentage of the profits, is not a menial servant and does not come under clause and Ordinance quoted."

In appeal, per CAYLEY, J.—" Affirmed. It is admitted by the plaintiff in his petition of appeal that the contract entered into by the defendant was for a ten months' service. In order to subject either party to the provisions of Ordinance No. 11 of 1865, such contract would have to be in writing and executed by the formalities prescribed by the 7th clause."

Vagrant Ordinance.

P. C. Nawalapitiya, 18678. The defendant was charged, under the 4th section of clause 3 of Ordinance 4 of 1841, with having been found in complainant's Estate for an unlawful purpose.

In appeal, against a conviction by the Magistrate (*Temple*), per CAYLEY, J.—" Affirmed. The charge has been laid under the 3rd instead of the 4th clause of the Vagrant Ordinance, but this irregularity cannot have materially prejudiced the defendant."

April 17.

Present STEWART, J.

Malicious injury.

P. C. Matara, 73248. The plaint was "that the defendant did, on the 21st March, 1874, at Carawe, unlawfully and maliciously break a fence stick from complainant's garden, and then and there strike and beat a dog of the complainant which was chained in the house." The Magistrate (*Jumeaux*) convicted the accused and fined him Rs. 2·50.

In appeal, per STEWART, J.—" Affirmed. There is evidence that the dog was maliciously and wilfully injured by the defendant. Dogs are personal property within the meaning of clause 19 of Ordinance No. 6 of 1846. See Hanway v. Boultbee, 4 C. & P., 350."

Possessing stolen property.

P. C. Panadure, 22541. The charge was "that the defendant did, on the 10th March, 1874, possess a carriage lamp of the value of Rs. 15, knowing the same to be stolen property."

In appeal, against a conviction by the Magistrate (*Ellis*), per STEWART, J.—" Set aside. The charge in this case is bad in that the ownership of the property is not stated in the plaint. It is also not alleged, as it ought to have been, that the defendant received the lamp in question knowing it to be stolen. When it is intended to charge a person with receiving stolen property, he should not be charged with possessing the goods, but with receiving them knowing the same to be stolen. See B. and V., part 2, page 10, per S. C. in P. C. Pangwille, 2254."

Arrack Ordinance.

P. C. Galegadere, 19886. This was an appeal against a conviction, under the 13th clause of Ordinance 4 of 1841, for selling arrack after 9 o'clock P. M.

Per STEWART, J.—" Set aside. The guilt of the accused depends upon whether arrack was really sold after 9 o'clock P. M. The evidence upon the plaint is not very satisfactory, nor does the Magistrate distinctly find that the sale took place after that hour, his opinion being that the arrack 'was sold most probably really after 9 P. M. by proper time.' According to one of the witnesses for the prosecution, the sale took place about 9 or 9.30. There is sufficient doubt to entitle the defendant to the benefit of it."

Fiscal's Ordinance. Jurisdiction.

P. C. Kalutara, 50188. The defendants had been convicted, under the 23rd clause of Ordinance 4 of 1867, of having obstructed the complainant, a peace officer, in executing a J. P. warrant.

In appeal, *Grenier*, for appellant. There were two fatal irregularities in the proceedings. The warrant in question had not been produced, nor had the Queen's Advocate's certificate been obtained to confer jurisdiction on the Police Court to entertain the charge.

Per STEWART, J.—" Set aside and proceedings quashed. This is a charge under the Ordinance No. 4 of 1847, clause 23, which renders the accused liable to such punishment 'by fine and imprisonment as it shall be competent to the Court before which he may be tried to award.' To allow of such an accusation being tried in an inferior Court, the election of the Queen's Advocate is necessary. See 119th sec. of Ord. No. 11 of 1868."

April 22.

Present STEWART, J.

Finding unclaimed property.

P. C. Point Pedro, 13899. A conviction by the Magistrate (*Drieberg*), for a breach of Regulation 15 of 1823, (which requires

all persons throughout the maritime districts finding unclaimed property to bring it to the Constable or Police Vidahn who is to report the same to the nearest Sitting Magistrate) was set aside, *in appeal*, in the following terms : "Proceedings quashed. By the 3rd clause of the Regulation No. 15 of 1823 (No. 19 in the plaint is a mistake for 15) under which this charge is laid, the party accused, if found guilty, is punishable 'by fine or imprisonment, either with or without being employed at hard labor, at the discretion and according to the powers of the Court or Magistrate before whom such conviction shall take place.' The election of the Queen's Advocate for the trial of this case in the Police Court was therefore necessary to give that Court jurisdiction. See 119th section of Ordinance 11 of 1868." Finding unclaimed property.

May 7.

Present CAYLEY, J.

P. C. Panwila, 14847. Twenty three coolies were charged with having left Lebanon Estate without notice or reasonable cause, in breach of the 11th clause of Ordinance 11 of 1865. The Magistrate (*Pennycuick*) acquitted the defendants, on the ground that they had acted *bona fide*, under the belief that certain "slips"* which the complainant (*Borron*) had signed were acceptances of notice to quit, as misrepresented to them by their Canganies. Labor Ordinance.

In appeal, (*Layard* for appellant, *Kelly* for respondent) the judgment was set aside, and the defendants were severally found guilty and each sentenced to forfeit all wages due to him or her at the time of leaving service but not exceeding one month's wages. And per CAYLEY, J.—"The defendants have not proved that they authorised the Canganies to give notice on their behalf to the complainant nor that the Canganies did give such notice in their names. As, however, the Police Magistrate is of opinion that the defendants were misled by the slips given to the Canganies, I think that a slight punishment will meet the justice of the case. The Supreme Court has frequently pointed out that in cases of this kind it is irregular, as a general rule, to charge so many defendants in one plaint. Not more than ten should be charged together. It does not appear, however, that in the present case parties have been materially prejudiced by the course adopted."

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* There were four separate slips produced at the trial. They were addressed to four different Canganies and were in one and the same form, —as follows :

"If——Cangany pays me the amount of his and his coolies' debts, I will next month square their accounts. (*Signed*) A. G. K. BORRON."

Toll Ordinance.

P. C. Kandy, 97826. The defendant (*John Scott*) was charged, under the 17th clause of Ordinance 14 of 1867, with having forcibly passed and taken his horse over the Teldenia Bridge, without paying toll. The complainant being affirmed, deposed as follows :

" I am the toll keeper at Teldenia. The defendant passed the Station on the 21st ultimo without paying toll. He shewed a pass from the Kengalle Toll Station for a horse and carriage.

Cross-examined. I was told by the defendant that this was the horse that had drawn the carriage. The defendant pointed out the carriage. He said it was at the Rest House."

The Magistrate (*Pennycuick*) dismissed the case in the following judgment : " I consider that the complainant was not justified in demanding toll for the horse, as the same horse with a carriage had passed through a toll-bar which cleared this one; the toll paid having been thus twice the amount payable for the horse alone. The case is dismissed."

In appeal, (*Creasy* for the appellant) per Cayley, J.—" Set aside and the defendant fined Rs. 2, half to go the complainant. The only question in this case is, whether the defendant, who had paid toll on a carriage drawn by a horse at the Kengalle Station, was entitled to pass the Teldenia Station without paying toll when riding the same horse, which had drawn his carriage through the Kengalle gate. It is admitted that payment of toll at the Kengalle Station clears the Teldenia Bridge, but payment of toll on a vehicle drawn by a horse will not clear the horse passing without the vehicle. As was pointed out in the case No. 6095, P. C. Colombo (*Beling* and *Vanderstraaten*, p. 11) the toll is made by the Ordinance payable on the vehicle drawn by the horse, not on the horse drawing the vehicle ; and in this respect there is no difference between the Ordinance 9 of 1845, upon which that case was decided, and the Ordinance 14 of 1867. The vehicle would pass the second Station free, but the horse, no toll having been paid on him, is still liable to toll at the second bar, unless he should pass it with the same vehicle which he drew through the first."

Assault.

P. C. Kandy, 97825. The same defendant as in the previous case was charged with assault by the same complainant, who deposed that, on his attempting to seize defendant's horse by the bridle in order to prevent the evasion of toll, the accused had struck him with his whip. The Magistrate (*Pennycuick*) entered a judgment of dismissal in the following terms :

" I have already held in the connected case No. 97826 that the

MAY 7.

Assault.

complainant was not justified in demanding toll. Under these circumstances to seize the horse's bridle was a most unjustifiable act on his part, and defendant adopted perhaps the most merciful course to get him out of the way. (It is not alleged that the blow was severe.) Case dismissed."

In appeal, (*Creasy* for appellant) per CAYLEY, J.—"Set aside and defendant fined Rs. 30. The Supreme Court has held in the case 97826 that the defendant had no right to pass the toll-bar without paying toll, and his assault on the toll-keeper was unjustifiable."

Cattle trespass.

P. C. Panwila, 14774. On this case (which is reported in page 17) being reheard in the Court below, the Magistrate (*Pennycuick*) pronounced the following judgment :

"The 2nd defendant is acquitted. As regards the 1st defendant I have no doubt that he was the owner of one of the cattle that trespassed, but I do not consider that it is in any way proved what proportion of the damage was done by that single animal. Any number of cattle may have trespassed, and probably did, to have caused the very great damage complained of, if the assessment is not excessive which I very much doubt. Under the 4th section of the Ordinance, the 1st defendant is fined Rs. 5, one half to complainant."

In appeal, (*Kelly* for appellant) per CAYLEY, J.—"Amended by the 1st defendant being condemned to pay Rs. 50 to complainant instead of the fine of five rupees. Considerable damage has been done to the complainant's estate by trespassing cattle, and it is proved that one of the animals belonged to the 1st defendant. The Supreme Court accordingly, when sending the case back at the last hearing of the appeal, decided that the 1st defendant should be held responsible for such proportion of the damage as it might be fairly inferred that his cow contributed to occasion. The Police Magistrate has awarded no damages, on the ground that it is not proved what proportion of the damage was done by the 1st defendant's cow. It is however impossible, where several animals trespass, to ascertain the precise amount of damage done by each. If such had to be done, in no cases of this kind could any damages be awarded. But a reasonable inference can be drawn, and this is all the Police Magistrate was required to do. The assessment of the headman is probably excessive, and other cattle may have trespassed as well as the four mentioned by the witnesses. But

Cattle trespass.

there is no evidence of this. Appellant's Counsel agrees to accept Rs. 50, and this appears to the Supreme Court to be a reasonably fair sum."

May 12.

Present Cayley, J.

Discovery of new evidence. Rehearing refused.

P. C. Colombo, 12628, The defendant was convicted by the Magistrate *(Fisher)* of not maintaining his illegitimate child and fined Rs. 10.

In appeal, *Ramanathen*, for appellant, submitted the following affidavit with the certificate therein referred to, as shewing that the child in question had been baptised in the Roman Catholic Church at Cottahena, and that the complainant and her husband Anenderene had been registered as its parents.

Ponnoo Modely of Colombo solemnly makes oath and declares that when the P. C. case No. 12628, Colombo was pending, he was not aware of the existence of the baptismal certificate, herewith attached, of the child for the non-maintenance of whom he was ordered to pay a fine of ten rupees in the Court below. He further makes oath and declares that he discovered this proof only after sentence had been passed.

In appeal, per Cayley, J.—" Affirmed. In this case I must refuse to send the case back for a further hearing. I can find no case in which it has been held that the Supreme Court has power to remand a Police Court case for further hearing, on the ground of the alleged discovery of new evidence. In the case 48342, P. C. Kalutara, (*Grenier*, p. 49, 1873) the Chief Justice expressed his doubt whether the Supreme Court had such power, but it was not necessary to decide the point in that case. A Police Magistrate cannot be considered as having committed any error in law in the present instance. He decided the case according to the best of his judgment upon the evidence adduced before him, which evidence, if worthy of credit, was amply sufficient to warrant the judgment of guilty. The case is quite different from one in which the Police Magistrate refuses to postpone a trial, when sufficient grounds to justify the postponement have been laid before him by affidavit. It is open to the appellant to bring a charge of perjury against the complainant, and if this charge should be substantiated, His Honor the Administrator of the Government would no doubt be induced to grant a pardon to the present appellant."

May 12.
False information.

P. C. Negombo, 30120. The plaint (as filed by the Secretary of the District Court, who was complainant on the record) was as follows:

"(1) that the defendant did, on the 5th January, 1874, at Negombo, in breach of the 166th clause of Ordinance 11 of 1868, give false information to C Liesching, Esq., a Justice of the Peace, to the effect that—(the substance of the affidavit made by the accused was here recited.)

"(2) that the defendant did, on a subsequent day, to wit on the 24th day of February, 1874, further attempt to support such false charge by giving false evidence before the said Justice of the Peace and did adduce evidence in support of the original false charge."

The Magistrate, (*Liesching*) convicted the defendant and sentenced him to pay a fine of Rs. 50 and the expenses of the prosecutor's witnesses, and also to be imprisoned at hard labor for three months.

In appeal, (*Grenier* for appellant) per Cayley, J.—" Set aside, and defendant found not guilty. The plaint in this case is informal. It should have alleged that the defendant wilfully gave the false information, and that he did so with intent to support an accusation of cattle stealing. And the second count of the plaint, which charges the defendant with giving false evidence at the hearing of the Justice of the Peace case, discloses a charge of perjury and not a charge under the Ordinance 11 of 1868, sec. 166. I should not, however, have set the case aside on the ground of technical irregularities which were not objected to at the trial, unless these irregularities were shewn to have materially prejudiced the defendant. But it appears to me that there is a substantial defect in the proof. In the affidavit sworn to before the Justice of the Peace, the defendant alleges (1) that on the 28th December some person or persons unknown stole a pair of his bulls; (2) that on enquiry he was informed by three persons, whom he names, that they had seen Appurala, Juanis Appu and Gilang driving away the animals; and (3) that on searching he (the present defendant) found one of the bulls tied in the jungle and the other slaughtered in the garden of one Baronchy. This defendant then charged the said Appurala, Juanis Appu and Gilang with cattle stealing. Now there is no proof that any one of the above three allegations in the affidavit is wilfully false or false at all. Indeed, the Police Magistrate admits that the defendant's witnesses may have misled him in the first instance. The defendant appears to have been in effect convicted, not for wilfully giving false information in his affidavit, but for giving false evidence at the hearing of the cattle stealing case,

False information. as alleged in the second count of the plaint. Such a charge is one of perjury and could not be tried by the Police Court. It is very probable that the defendant persisted in going on with the cattle stealing case after he had good reason to believe it false, but he could only be tried in the Police Court for what he stated in his first information, and this has not been proved to be wilfully false."

May 19,

Present CAYLEY, J.

Maintenance. Autre fois acquit. *P. C. Matara*, Lr. I. The Magistrate (*Jumeaux*) having refused, on the ground of a previous acquittal, to issue a summons on a plaint which charged the defendant with not supporting his illegitimate child, the complainant appealed.

Per CAYLEY, J.—" Set aside and case sent back to be proceeded with: complainant to be at liberty to amend his plaint. The offence is a continuing one, so that the case No. 73222 will not necessarily be a bar to the present case, which is a charge of non-maintenance for a period not included in the charge which formed the subject of case No. 73222. Had there been a distinct adjudication in the case No. 73222 on the question of paternity, I think that it would not be competent for the complainant again to raise that issue, for *nemo debet bis vexari pro una et eadem causa*. See 5008, P. C. Colombo, Grenier's Reports, 1873 (P. C.) 21. But in No. 73222, the Police Magistrate expressed his inability to adjudicate on the question of the child's paternity, in consequence of the state of the evidence, and accordingly discharged the defendant without even formally finding him guilty or not guilty. Complainant should aver in his plaint that the child is the defendant's child."

Resisting the Police. *P. C. Jaffna*, 1339. The plaint was as follows :—" that the defendant did, on the 1st day of April, 1874, at the Police Court, Jaffna, resist a Police officer, to wit, Police Sergeant Mayo, 870, in the execution of his duty, in breach of the 75th clause of Ordinance 16 of 1865." The evidence showed that the accused (a Police Vidahn) was in Court in charge of a prisoner, and that in consequence of the Magistrate requiring the Police in attendance to stop the noise in Court, the complainant had endeavoured to prevent

the defendant from talking but had failed. What transpired afterwards the complainant deposed to as follows : "Defendant continued to talk. I went up to him and told him to get up and go outside. He did not do so, and I had to lift him up by the arms and then tell him to go. He pushed me back and said 'Do you know who I am.' He pushed me back with his hand. The Inspector came up and ordered him to sit down and not talk. He did so. I was not rough to him." The acting Magistrate (*Thwaites*) convicted the accused and sentenced him to pay a fine of five shillings.

Resisting the Police.

In appeal, per CAYLEY, J.—"Set aside and defendant found not guilty. It is no doubt the duty of the Police to keep order in Court, but I do not think that it is necessarily their duty forcibly to eject, without express orders from the presiding Magistrate, a person whose duty requires him to remain in Court merely because he is talking. Not that the Police Serjeant is to blame, for it appears that he was not aware that the defendant was in Court in charge of a prisoner whom he could not leave, whereas the defendant was certainly to blame for not desisting from conversation when warned to do so by the Serjeant. I think, however, that the charge as laid in the plaint is not substantiated. It is clear from the judgment by the Police Magistrate that there was no intentional disturbance of the Court on the part of the defendant. He is a respectable Police Headman, and had a prisoner in his custody at the time. As he was seated talking with his neighbour, after being warned to be silent, the Police Serjeant endeavoured to eject him by lifting him up by the arms when he gave the former a push with his hand. Upon this the Inspector came up and directed the defendant to sit down and be quiet, and with this direction the defendant immediately complied. The defendant is not charged with assaulting the Serjeant, but with resisting him in the execution of his duty, and I think that it would be straining the operation of the Ordinance too far to hold that a momentary push with the hand (a 'mere push' as the Police Magistrate calls it) given in the impulse of the moment by a man situated as the defendant was and immediately followed by a complete submission should be construed into the commission of the serious offence of resistance to the Police in the execution of their duty."

May 22.

Present CAYLEY, J.

P. C. Nawalapitiya, 18813. The plaint was as follows : "that the defendant did, in March 1874, at Dickoya, give false information

False information.

False information. to a Justice of the Peace, in breach of the——clause of Ordinance No. 11 of 1868, whereby he wanted 4 people to be arrested."

In appeal, against a conviction by the Magistrate *(Temple)*, the proceedings were quashed; and per CAYLEY, J.—"Set aside, and proceedings quashed. It does not state that the defendant wilfully gave false information, nor does it state to whom the information was given, nor does it state what the information was which is alleged to be false, nor does it aver that the information was given to support a false accusation or to prevent the detection of any offence. A summons should not have been issued on such a plaint."

Riotous conduct. *P. C. Kalutara*, 50636. The plaint was "that the defendants did, on the night of the 1st May, 1874, on the Kalutara high road, fight and behave in a riotous manner, in breach of section 6, clause 53 of Ordinance 16 of 1865." The Magistrate *(Power)* found the accused guilty and fined them each Rs. 50.

In appeal, per CAYLEY, J.—"Affirmed. The clause is wrongly laid under the 6th article of the 53rd section of Ordinance No. 16 of 1865. That article applied only to persons who are drunk and riotous and has been repealed by the Ordinance 7 of 1873. Riotously fighting in the high road, however, is an offence at common law, and the defect in the plaint, which was not objected to in the Court below, cannot have prejudiced the defendants."

Maintenance. *P. C. Panadure*, 22420. The defendant was charged with not maintaining his wife and two children, in breach of section 2, clause 3 of Ordinance 4 of 1841. It appeared from the evidence that the complainant had property of her own, and that she was living on it and that she had separated from her husband (the accused) early in 1872, after entering into a notarial agreement to the following effect :—

"1st. That the parties abovementioned, Diwonohami and Siman Perera, lived as husband and wife for a long time, but at present as they cannot live agreeably and peaceably, and as they apprehend that there will be great quarrels and disputes between them should they live as husband and wife hereafter, they with their own accord and consent have agreed and covenanted to live separate from each other, from the date hereof for ever.

"2nd. A sum of seventy-five rupees was hereby delivered over to the said Diwonohami by the said Siman Perera for her maintenance from this date during the existence of her life.

"3rd. That the said Diwonohami hath agreed by these presents that she will not claim maintenance, or institute any case against the said Siman Perera, charging him with having been undutiful towards his wife hereafter.

Maintenance.

"4th. The said Siman Perera hath agreed that he will not institute any case against the said Diwonohami, charging her with having been undutiful towards her husband.

"5th. That the female child named Nonohami, born of Diwonohami for the said Siman Perera, was taken charge of by the said Siman Perera, to support her till she attains her years of discretion.

"6th. It is futher agreed, that Siman Perera is not in charge of any of the property belonging to Diwonohami, and that Diwonohami is not in charge of any of the property belonging to Siman Perera; and that the said Siman Perera shall not be entitled to any of the landed properties which the said Diwonohami is entitled to through her parents, and that the said Diwonohami shall not be entitled to any landed property which belongs to Siman Perera."

The Magistrate *(Power)* held as follows: "The accused is clearly liable under the Ordinance to support his child; the word 'others' in the Ordinance applies to complainant, his wife, as well as third parties. He is found guilty and fined Rs. 5."

In appeal, (*Creasy* for appellant) per CAYLEY J.—"Set aside and case remanded for a new trial. I should have sent the case back for a further hearing, if the complainant had not been examined as a witness; but, as in these cases a wife is incompetent to give evidence against her husband, it will be better that the case should go back for a new trial. The Police Magistrate is right in holding that the notarial deed of separation does not absolve the defendant from the duty of maintaining his wife and children; but, as pointed out by Mr. Justice Stewart in the case No. 85588, Police Court of Galle, (Grenier's Reports, 1873, page 93), the arrangement effected by such a document may be a circumstance to be taken into consideration in determining whether there was such a *mens rea* or *mens conscia* on the part of the defendant as to render him criminally liable. It appears by the deed of separation that the parties agreed to live apart and that the defendant should have the charge of one of the children named Nonohami, and that each party should relinquish all right to any landed property to which the other might be entitled. It also appears from this deed that the defendant paid over to the complainant the sum of seventy five rupees for her maintenance, and the complainant's first witness states that the complainant has some property of her own. It is also proved by the Police Headman,(if his evidence is worthy of credit) that the defendant asked the complainant to give him one of the children but that she refused. There is no evidence of any demand having been made to the defendant for maintenance, or that the defendant knew that his wife and children were not sufficiently provided for. In view of the above

Maintenance. circumstances, it appears to me to be quite possible that the defendant acted under the bonâ fide belief that he had, by relinquishing all his rights to his wife's property, allowed his wife sufficient property to maintain herself and her child or children. If this view is correct, it would be unduly pressing the operation of the Ordinance No. 4 of 1841 to hold that the defendant should be decreed an idle or disorderly person for not maintaining his family."

May 26.

Present CAYLEY, J.

Jurisdiction. *P. C. Gampola*, 25703. The plaint charged the accused with having seduced six coolies who were bound to serve on complainant's estate, in breach of the 19th clause of Ordinance 11 of 1865. The Magistrate (*Bell*) held as follows: "I am quite clear that the defendant came to Mount Temple Estate and there seduced from the service of the complainant several coolies. He, the defendant, is found guilty and sentenced to be imprisoned with hard labor for the space of three months and to pay a fine of Rs. 50: to be further imprisoned until such fine is paid, one month for each ten rupees."

In appeal, per CAYLEY, J.—"Affirmed, but that part of the sentence to be struck off which sentences the defendant to one month's imprisonment for each Rs. 10 until the fine is paid. Such further imprisonment will no doubt be the result of the fine not being paid, if, on return of the warrant of distress, it appears that no sufficient distress can be had thereon; but the Police Magistrate has exceeded his jurisdiction in adding the further imprisonment to his sentence."

Maintenance. *P. C. Kandy*, 98246. The plaint charged the defendant with not maintaining the complainant and his children by her, in breach of the 2nd section, 3rd clause of Ordinance 4 of 1841. The Magistrate (*Pennycuick*) delivered the following judgment: "complainant is defendant's wife and refused to go and live with him, he being willing that she should do so. Under these circumstances I cannot interfere. Case struck off."

In appeal, per CAYLEY, J.—"Set aside and case remanded for further hearing. It is not admitted by complainant, nor is it proved, that defendant had offered before the period of desertion, for which this charge was brought, to take back his wife. The complainant should also have an opportunity of calling witnesses to prove (as she states in her petition of appeal) that her husband's conduct was such as to justify her in refusing to live with him. See P. C. Galle, 78929, Grenier's Reports, 1872, page 5."

June 2.

Present STEWART and CAYLEY, J. J.

Theft. Claim to property.

P. C. Panadure, 22755. The plaint charged the defendants with having stolen and carried away 13 sugar canes, the property of the complainant. The Magistrate (*Power*) held as follows: "I have no doubt that the sugar canes were cut by the defendants; but whether cut with the knowledge that they were stealing what they have no right to, or under a belief that they, as members of the same family, had a share in and right to a portion of the produce of the enclosure, is not quite clear. I incline to the former, from their after acts which were not those of honest men. But as the Supreme Court has on several occasions held that where a title to land appears to be in dispute, or the accused in Police Court cases appear to have some right or to have acted under the belief they had one, the case should not be entertained. I think defendants should be discharged. This does not preclude the complainant from suing for the value of his canes and damages."

In appeal, per CAYLEY, J.—" Set aside and remanded for further hearing. This case requires further consideration. According to the evidence, the 1st defendant had no share in or right to the land, which appears to have been planted by the complainant and in his possession. It is not enough for the defendant barely to suggest a claim on his part. The Magistrate must determine whether the claim is a mere pretence and fictitious or bona-fide."

June 5.

Present STEWART and CAYLEY, J. J.

Labor Ordinance.

P. C. Nuwara Eliya, 9079. The complainant, William Smith, of Mattekelle Estate in Lindoola, charged three Canganies with desertion in the following plaint:

"That the defendants did, while in the service of the complainant, refuse to attend to work on the 6th May, without any reasonable cause, and did leave the service of the complainant on the 7th May, without due notice, in breach of the 3rd and 11th clauses of the Ordinance No. 11 of 1865."

The complainant admitted that the accused had not been paid their wages for February, March and April, but he explained to the Court that the 1st and 2nd defendants were nevertheless in his debt, (evidently on account of advances) while he owed a "small balance" to the 3rd defendant. He also admitted having received on the 11th April a letter from Mr. Proctor Bartholomeusz, dated the 4th April, giving notice that defendants would cease to work on the 5th May, and asking for a settlement of their account.

Labor Ordinance.

The Magistrate (*Hartshorne*) held as follows: "The issue in this case is very simple and depends upon the date on which the notice was given. The notice is dated April 4th. The complainant swears that he did not receive it until April 11th, and produces the original green counterfoil of the registered letter in which it was conveyed to him. The Court is bound to accept it as proved that the complainant received the notice on April 11th, because his evidence to this effect is in no way disputed, and the burden of proving the sufficient delivery of notice manifestly falls upon the defendants. The defendants ceased to work on May 5th, and thereby rendered themselves liable to the penalties laid down in clause 11 of Ordinance No. 11 of 1865. But Mr. Vandort urges in excuse for them their assumed ignorance of the law. It would in most cases be reasonable to take this into consideration in determining the amount of punishment for an offence of this nature, but it is a question which must be wholly disregarded in deciding upon the guilt or innocence of an accused person; and in the present instance it is urged to no purpose in the face of the distinct warning which the complainant gave to the defendants, when they ceased to work, that they were violating the provisions of the Labor Ordinance. Another objection raised for the defence, that the wages of the defendants were unpaid, and that they were therefore justified in leaving the complainant's service when they chose, need not be considered. If this was the case, where was the need of any notice at all? But it has not been shewn that wages were even demanded, whilst the 1st and 2nd defendants actually left their service in the debt of the complainant. It may be well for the Court clearly to explain that it considers that the notice received by the complainant began to run from April 11th, the date on which it was received by him, and not from April 4th, the date upon which it was written. It is clearly the intention of the law that an employer should have one whole month's notice of the intention of his servant to leave his service and vice versa; otherwise, from easily conceived causes, a period of notice might be reduced to merely one day. The Court only enters into this question, not because it considers that it admits of the least argument, but because the leading Proctor for the defence urged that it was one upon which persons might reasonably differ. The Court thus is of opinion that the defendants did commit a breach of the Ordinance under which they are charged, and in view of the circumstances that they acted wilfully and in

spite of the complainant's warning, sentences them severally to be imprisoned at hard labor for three months." Labor Ordinance.

In appeal, per STEWART, J.—"Set aside as to the 3rd defendant and appellant. It being admitted that wages were due to the 3rd defendant for more than a month, his claim, under Mr. Bartholomeusz's letter of the 4th April, should have been paid before the 5th May to entitle the complainant to maintain the present charge against this defendant for failure to work on the 6th May. The judgment is affirmed as to the 1st and 2nd defendants."

June 9.

Present STEWART and CAYLEY, J. J.

P. C. Panadure, 22782. The defendants were charged with assault. In the course of the trial, one of the witnesses, Sanchy Hamy, was required by the Magistrate (*Green*) to give security to answer to a charge of contempt in that she had given evidence as follows : Contempt.

"I am mother of 2nd defendant. Complainant was not assaulted at all. (She is cautioned by the Court.) I did not see the assault. I was in the village that day. I stick to it that there was no assault, though I remember the dispute perfectly."

On the following day, the Court made order as follows : "Sanchy Hamy is brought up. She says she is the mother of three children. She is excused being sent up for perjury, and the matter is treated simply as contempt, she having been cautioned by the Court. Fined rupees five."

In appeal, Grenier, for the appellants, would not trouble the Court as to the conviction of the defendants, as it was a finding on facts. The punishment of the witness, however, for contempt was wrong, as a mere attempt to deceive the Court by false evidence did not amount to a contempt. C. R. Colombo, 43832, Civ. Min., 17th September, 1866.*

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* Per Curiam :—"That the judgment of dismissal of the Court of Requests of Colombo of the 13th day of June, 1866, stand affirmed, but that the order for fining the plaintiff and his witnesses be set aside. The Supreme Court has repeatedly pointed out the necessity of caution and forbearance in the employment by Judges and Commissioners of the power of committing for contempt, although the existence of such a power is indispensable for the due administration of Justice, and it ought to be firmly put in force on proper occasions. But it would be hazardous in the extreme to give a general sanction to the use of this summary punishment, as it has been used by the Commissioner of the Court of Requests on the present occasion, for such a merely constructive contempt as the attempt to deceive the Court by false

Contempt.

Per Cayley, J.—" Affirmed as regards the conviction of the defendants, but set aside as regards the fine of the witness. The witness may have committed perjury, but there is nothing in the record of her evidence to shew that she was guilty of such prevarication as would amount to contempt of Court. It may be well to bear in mind, as observed by this Court in No. 43832, C. R. Colombo, Supreme Court Minutes, 17th September, 1866, that mere falsehood does not necessarily amount to prevarication."

June 12.

Present Stewart and Cayley, J. J.

A defendant not attending Court is not entitled to expenses.

P. C. Jaffna, 5535. The complainant (a toddy-renter) charged two defendants with a breach of clauses 39, 40 and 46 of the Arrack Ordinance 10 of 1844. The 2nd defendant, a married woman, who was living on the land in question with her husband, was absent on the day of trial when the charge was withdrawn, evidently by pre-arrangement. The acting Magistrate (*Thwaites*) condemned the complainant to pay two rupees to the 2nd defendant " for having made her an accused for the purpose of annoying her."

In appeal, per Stewart, J.—" Set aside. The 2nd defendant not having attended, no expenses or payment could be awarded to her."

June 16.

Present Stewart and Cayley, J. J.

Malicious injury.

P. C. Ratnapura, 14567. Ten men were accused of maliciously pelting stones at complainant's house and destroying about 100 tiles, in breach of clause 19 of Ordinance 6 of 1846. The Magistrate (*Nevill,*) after hearing evidence, held as follows : " This is a gross misjoinder. There is no tittle of evidence to shew that the 2nd, 5th, 6th, 8th and 10th defendants were in any way guilty of the charge or accessory to the malicious injury to the roof. The charge against the 1st and 9th defendants rests on one witness'

evidence. Without saying that there never can be cases of such flagrant and insolently audacious falsity as to amount to contempt of Court, we have no hesitation in saying that such cases must be very extreme and very rare ; and that the present case is not one of them. It may be well to bear in mind that mere falsehood does not amount to prevarication, and we would draw attention to the valuable advice, as to committals for contempt, which is contained in the judgment of the Supreme Court, delivered by Sir William Rowe on the 3rd of June, 1857, in case 18928, C. R. Jaffna, which is reported in part II of Lorenz's Reports, page 85. *Civ. Min.* Sept. 17th, 1866.

evidence only. Such a wilful misjoinder prejudices the other defendants illegally and unfairly, and is not to be tolerated. Defendants discharged from trial." Malicious injury.

In appeal, per CAYLEY, J.—" Set aside and case sent back for further hearing and adjudication. The Police Magistrate does not say that he disbelieves the evidence, but he has apparently discharged all the defendants, on the ground that there is no evidence against several of them, and that the defendants generally have been prejudiced by the improper joinder of these persons. This is, no doubt, a ground for looking with suspicion upon the complainant's case, but it is not a legal bar to the prosecution; nor need the defendants, against whom there is evidence, necessarily be prejudiced by the course adopted by the complainant; for it will be competent for the Police Magistrate, at the close of the case for the prosecution, to discharge those defendants against whom he considers the case not proved, and allow the other defendants to call them as witnesses for the defence."

P. C. Kegalle, 36791. This was a charge, under the Timber Ordinance, against two defendants who were found guilty by the Magistrate (*Stewart*) and sentenced to pay a fine of fifty rupees each. Timber Ordinance.

In appeal, per CAYLEY, J.—" Affirmed, but altered by the amount of the fine being reduced to rupees fifty, as one fine for one offence; and it is adjudged that the defendants do pay the said sum. See P. C. Kalutara, 49704, Grenier's Police Court Reports, 1873, page 111."

June 19.

Present STEWART and CAYLEY, J. J.

P. C. Kandy, 98585. The accused appealed against the judgment of the Magistrate (*Pennycuick*), on the ground that when the charge had been read to him in the Court below, he had pleaded not guilty, but that the Interpreter, having misunderstood the plea in Tamil, had incorrectly conveyed to the Magistrate the plea of guilty. This allegation was supported by an affidavit. In forwarding the record to the Supreme Court, the Magistrate wrote —" This is evidently an afterthought. The prisoner said 'guilty because he was brought to the Court'; being told that he must plead distinctly 'guilty' or 'not guilty', he distinctly pleaded 'guilty.' " Practice. Plea.

Per STEWART, J.—" Affirmed."

Striking off cases.

P. C. Galle, 88414. This was a case of assault (certified by Dr. Meir, Asst. Col. Surgeon, as to contusions and wounds) which the Magistrate (*Lee*) struck off the roll, remarking "complainants not ready. No cause shewn by affidavit."

In appeal, the complainants prayed for a rehearing, on the plea that they "were not aware of the new practice of procuring affidavits stating the reasons why parties are not ready."

Per CAYLEY, J.—"Affirmed. The complainants should apply to the Police Magistrate for leave to reinstitute their complaint, if their witnesses were absent on the day of trial without any default of their own."

Security to keep the peace.

P. C. Matale, 6258. Of four defendants who were charged with assault, the Magistrate (*Penney*) acquitted two, and ordered the rest "to give security in Rs. 500 each for good behaviour and to keep the peace for six months."

In appeal, (*Ferdinands* for appellants) per STEWART, J.—"Altered by the defendants being each required to find security to keep the peace in the sum of rupees three hundred and for the period of three months. A Police Magistrate, as such, has no power to bind over parties to their good behaviour. Under the 104th clause of the Administration of Justice Ordinance, a Magistrate may in certain cases bind over parties to keep the peace, but not in a sum exceeding three hundred rupees or for a period exceeding three months."

Timber Ordinance. Sentence increased at a re-hearing.

P. C. Matale, 4568. On this case (which is reported in page 18) being returned to the Court below, the complainant called no further evidence, but the Magistrate (*Penney*) having heard only the witnesses for the defence, reconvicted the accused and sentenced him, in addition to the former fine of Rupees 50, to be imprisoned at hard labor for ten days.

In appeal, Ferdinands, for appellant. Even assuming that the verdict was correct, the Magistrate had no right to increase the sentence which he apparently did to punish the defendant for the original appeal. [CAYLEY, J. A rehearing of the whole case was ordered by the Supreme Court, and in imposing the sentence in question the Magistrate has not exceeded his jurisdiction. The law gives us no authority to interfere.] It was hard enough for an accused party to be denied the right of appealing against a finding on facts, however erroneous that finding might admittedly be, but to

be denied redress as against such punishment as was obviously excessive was to be told, what the law proverbially never recognised, that there might be a grievous wrong without a remedy. The Chief Justice had in a case reported in II *Grenier*, p. 48, very properly reduced a sentence on the ground that it was disproportionate to the offence charged. [STEWART J.—There an error in law had been committed, for the assault complained of having been nominal the punishment should legally have been nominal and not substantial. The defendant in this case may petition the Governor if so advised.]

Timber Ordinance. Sentence increased at a re-hearing.

PER CURIAM.—Affirmed.

June 23.

Present STEWART and CAYLEY, J. J.

P. C. Negombo, Lr.A.—The complainant charged the defendant (a constable) with having knowingly and with evil intent exceeded his powers, in searching complainant's house without a warrant for alleged stolen property. On being examined, the complainant stated—"Defendant came to the house saying certain jackets, stolen from a third party, were said to be secreted in my house. He sealed up a certain box of mine supposed to contain those jackets: that is all I complain of." The Magistrate (*Liesching*) thereupon held that the constable could hardly be said to have exceeded his powers and refused process.

Refusal of process.

In appeal, per STEWART J.—"Set aside and remanded for further hearing. Neither the plaint nor the examination of the complainant discloses that no offence, or one not cognisable by the Police Court, was committed. It is only in such cases that process can be legally refused."

June 26.

Present STEWART and CAYLEY, J. J.

P. C. Galle, 88747. This was a charge under the Vagrant Ordinance, "for keeping, holding and using a boutique for the purpose of common or promiscuous gaming with dice." The Magistrate (*Lee*) convicted the defendant.

Gambling

In appeal, Ondatjie, for appellant. There is no evidence of the kind of gambling carried on in the boutique in question. (Vanderstraaten's Reports, 1870, p. 40; Grenier's Reports, 1872, p. 15.) [CAYLEY, J.—The cases cited refer to gambling, not to keeping a gambling house.] But both offences come under the same clause.

Per CAYLEY, J.—"Set aside and case remanded for further

Gambling.

hearing. There is no evidence of the kind of gaming that the house was kept for, and that gaming was of the nature referred to in the 19th section of Ordinance 4 of 1841. The gaming as laid in the plaint should be proved."

Security to keep the peace. Gansabawes have no power to bind over.

J. P. Matara, Lr. A.—The complainant submitted in the Court below an affidavit charging the persons therein named with unlawfully assembling to commit a breach of the peace. Having been referred by the J. P. (*Jumeaux*) to the Gansabawa, he appealed.

Per STEWART, J.—" Set aside and remanded for the charge to be entertained. The Justice of the Peace is bound to make due enquiry into the charge preferred by the complainant, and to deal with it as the circumstances of the case may require. Village-tribunals have no power, under the Village Communities Ordinance, 26 of 1871, to bind over parties to keep the peace."

Sub-renter of tolls entitled to file an unstamped plaint, in matters relating to his rent.

P. C. Chavakachcheri, 25. This was an appeal against an order of the Magistrate (*Drieberg*), holding that the complainant, as sub-renter of tolls, had no right to file an unstamped plaint.

In appeal, per CAYLEY, J.—" Set aside, and case sent back to be proceeded with. We think that the defendant, who in point of fact represents the original renter, and does so under the license of the Government Agent, must be treated as a Government renter under the 1st section of Ordinance 18 of 1871, and is accordingly entitled to file an unstamped plaint in matters relating to his rent."

Possessing stolen property.

P. C. Matara, 73527. The proceedings in this case were quashed, as the plaint charging the accused with " possessing stolen property knowing the same to be stolen" was held to disclose no legal offence. The offence ought to have been laid as " receiving the stolen articles knowing the same to have been stolen."

June 30.

Present STEWART and CAYLEY, J. J.

Maintenance.

P. C. Kandy, 97859. This was a charge for maintenance under the Vagrant Ordinance. The Magistrate (*Pennycuick*) found the accused guilty in the following terms : " The Defendant has pleaded guilty of this charge once in case No. 96021, nor does he show now that he has since offered the complainant any support."

In appeal, per CAYLEY, J.—"Set aside and defendant found not

guilty. It was incumbent upon the complainant to prove that the defendant has neglected to maintain her since the last case was decided, and this she has failed to do." Maintenance.

P. C. Colombo, 13932. Two defendants having been found guilty of assault, the Magistrate (*Conolly*) sentenced the 1st defendant to 3 months' imprisonment at hard labor, and " further to pay a fine of Rupees 50—in default of payment, one month's hard labor for each Rupees 10 unpaid." Jurisdiction. Sentence as to non-payment of a fine.

In appeal, per CAYLEY, J.—" Affirmed, except as to that part of the sentence which sentences 1st defendant to one month's hard labor for each Rupees 10 of the fine unpaid. This will be the result of the non-payment of the fine, if there is no sufficient distress; but as the Police Magistrate has already sentenced the 1st defendant to 3 months' imprisonment, he exceeded his jurisdiction by adding a further term to the sentence."

P. C. Badulla, 17032. The defendant was charged with not maintaining his wife and children. The wife under cross-examination stated—" The defendant had frequently ill-treated me, and I consequently left him. I went back to him several times, but was always ill-treated again." The Magistrate (*Sharpe*) however entered a verdict of acquittal, in view of defendant's willingness to support his family if they should return to his house. Maintenance. Wife not a competent witness. Husband bound to support family leaving his house on account of ill-usage.

In appeal, per CAYLEY, J.—" Set aside and case sent back for a new trial. If the complainant can satisfy the Police Magistrate that her husband's ill-usage was such as to compel her and her children to leave his house, he will be liable to maintain them, although they refuse to live with him. He cannot evade his liability to support his family by his own misconduct. See 98246, P. C. Kandy, *Grenier*, 1874, p. 32 (P. C. Rep.) It is to be observed that the complainant is not a competent witness against her husband, and must not be examined at the new trial."

P. C. Matale, 6753. In this case the complainant had been properly referred by the Magistrate (*Penney*) to the Gansabawe, as the assault complained of was of a trifling character. The complainant was further ordered to pay each of the defendants Rs. 1, and Rs. 5·25 as Proctor's fee. An appeal against this order was filed but was rejected by the Magistrate " as the Supreme Court has already affirmed a precisely similar case of this Appeal.

Appeal.

Court." Subsequently, however, the record was sent for by the Supreme Court on the motion of Counsel.

Per Stewart, J.—" Affirmed. The Police Magistrate must always forward petitions of appeal when duly filed, whether there be valid grounds for the same or not."

Refusal of process.

P. C. Matara, Lr. K. The plaint was "that the defendants did, on the 23rd June, 1874, at night, assault and beat complainant at her house, and steal and take away brass lamps, &c., being the property of the complainant." The Magistrate, (*Jumeaux*) made the following order in refusing process: File civil action. Complainant admits the accused are all related to her, and lived in her house."

In appeal, per Cayley, J—" Set aside and case sent back to be proceeded with. The plaint discloses a legal offence and one cognizable by a Police Court."

Maintenance.

P. C. Balepitimodera, 45149. The defendant was charged with not maintaining his wife, the complainant, who, being duly affirmed, deposed as follows:

" I am the wife of the defendant. The banns of marriage were published. I was conducted to Radgama, defendant's village, and lived with him as man and wife. The banns were duly published by the Thombo-holder of my village. Defendant took away the certificate from the Thombo-holder. After this I was conducted and lived with the defendant.

Cross-examined. I have no extract from the Register in the Kachcheri. I don't know if the marriage was ever registered.

The Magistrate (*Gibson*) discharged the defendant, holding "the parties were not legally married, and therefore there is no case."

In appeal, per Cayley J.—" Set aside and case remanded for further hearing. It does not appear when the alleged marriage took place. If it took place before the Ordinance No. 13 of 1863 came into operation, and was in other respects a good marriage, the mere non-registration will not render it invalid. See section 4. If complainant is proved to be his wife, she will not be a competent witness against him, and the charge will have to be established by other witnesses."

False information.

P. C. Galagedere, 20127. This was an appeal against the conviction by the Magistrate (*Dunlop*) of the defendant on the following plaint:

" That the defendant did, on the 8th April, 1874, and on the 28th April, 1874, knowingly and wilfully give false information to the J. P. of Gala-

gedere with intent to support a false charge of Arson against the complainant, in breach of the 166th clause of Ordinance No. 11 of 1868." False information.

In appeal, per CAYLEY, J.—" Set aside and proceedings quashed. The plaint in this case does not set out, as it ought to have done, the false information or the purport of it given by the defendant."

July 3.

Present STEWART and CAYLEY, J. J.

P. C. Colombo, 15255. This was a case of Sodomy fully proved by complainant and two other witnesses. The accused was sentenced by the Magistrate (*Conolly*) in the following terms: " This is a clear case of indecent assault. It is a very bad case. The evidence I have taken speaks for itself. The accused is a Caffre about 33 years. The boy is at most 16 years old. Accused is sentenced to 3 months' hard labor and further to receive 20 lashes on his bare back." The Queen's Advocate appealed, on the ground that the offence committed was beyond the jurisdiction of the Police Court. Jurisdiction.

Per STEWART, J.—" Set aside and proceedings quashed. This charge is beyond the jurisdiction of the Police Court. The case is sent back for the Police Magistrate to take proceedings under the provisions of the 103rd section of Ordinance 11 of 1868."

P. C. Colombo, 15251. This was a case of Sodomy, defendant pleading guilty to a charge of " indecent assault." The Magistrate (*Conolly*) held as follows: " The defendant pleads guilty. He has been often before the Court and is an old offender. This charge was originally one for Sodomy, but the case, with the concurrence of the Deputy Queen's Advocate, was transferred to the Police Court: defendant is sentenced to 3 months' hard labor and further to receive 10 lashes on the bare back." The Queen's Advocate appealed. Jurisdiction.

Per CAYLEY, J.—" Set aside and proceedings quashed for want of jurisdiction of the Police Court: proceedings should be taken against the accused under the 103rd section of Ordinance 11 of 1868."

July 7.

Present STEWART and CAYLEY, J. J.

P. C. Galle, 88466. The plaint filed by the Queen's Advocate, who was the complainant on the record, was as follows: Customs Ordinance.

Customs Ordinance.

"That the defendant abovenamed, on the 26th April last, within the limits of the Fort of Galle, did unship or were assisting or otherwise concerned in the unshipping of certain goods liable to duty, of the value of Rs. 17·50, the duties for which have not been paid or secured, contrary to the section 104 of Ordinance 17 of 1869."

The Deputy to the Queen's Advocate for the Southern Circuit having elected to prosecute in the Police Court, the Magistrate *(Lee)*, having heard the evidence adduced for the complainant, held as follows. "This is a plaint laid under the 104th clause of the Ordinance No. 17 of 1869, by which it is provided that in each and every of certain cases therein set out a forfeiture of treble the value of the goods or a penalty shall fall upon the party performing certain acts, therein declared unlawful. It is to be noted that this clause does not, like the 111th clause, make the commission of a certain act an 'offence,' nor does it enact that the offender shall be 'subject to a fine,' nor does it speak of 'conviction' (compare clause 111.) Clearly, therefore, there is a distinction intended. Referring to clause 115th, it will be seen that that clause provides that 'penalties' and forfeitures shall be sued for and recovered in like manner as in other revenue cases. This use of the words 'sue for' and 'recover' shows the civil and non-criminal nature of the proceedings. The clause then proceeds to give the Queen's Advocate power to prosecute in the Police Court for *offences* or acts not otherwise cognizable by it, but it does not confer on the Queen's Advocate power to bring a civil matter before a criminal Court. If the charge were laid under clause 111, upon the certificate of the Queen's Advocate the Police Court would have jurisdiction; but clause 115 gives the Queen's Advocate no power to impose a civil jurisdiction upon a criminal Court. Holding this, therefore, to be a civil proceeding, I am of opinion that this Court, being a Court of criminal jurisdiction, cannot adjudicate herein. This being my view of the law, I proceed to state that I find on the facts that the accused parties before me were concerned in the unshipping of certain goods liable to duty. The defendants are however discharged, this Court having no jurisdiction."

In appeal (the *Queen's Advocate* for appellant) per STEWART, J.—"Affirmed. The Supreme Court concurs with the Magistrate in considering that the Police Court has no jurisdiction to deal with penalties and forfeitures incurred under the 104th section of the Ordinance No. 17 of 1869. The first part of the 115th section leaves intact the mode of procedure previously existing, that pen-

alties and forfeitures should be sued for and recovered by information in the name of the Queen's Advocate. The latter part of the section appears to us to provide a further remedy in the Police Court, (limited as therein prescribed) not in all cases of penalties and forfeitures, but only in such where an offence is declared, and a punishment attached to it. An obvious distinction, it will be perceived, runs through the whole Ordinance, some clauses declaring the infraction of a regulation to be an offence, whilst others only enact a penalty and forfeiture for the infringement. We may also remark that by prosecution as a criminal, the defendant is prevented from calling himself as a witness, and giving evidence on his behalf, which he would be enabled to do in a civil proceeding —and besides is liable on conviction, in the event of his not being able to pay the penalty, to imprisonment with hard labour. It would require, therefore, very clear and express words to support a construction entailing such consequences." Customs Ordinance.

P. C. Ratnapura, A. The plaint charged the defendant with having "wilfully and maliciously pelted stones at the roof of the complainant's house, in a manner calculated to injure person and property, in breach of the Ordinance." The Magistrate (*Nevill*) refused summons in the following terms: "Three stones were thrown, complainant states, in order to annoy him and frighten him. If the nuisance becomes serious, he can apply to the J. P. on a charge of intimidation. He states the ill-will arose because his wife had abused defendants, and if so the remedy is in his own hands, to see that his wife behaves as a respectable and peaceable person. I see no grounds for summons." Pelting stones.

In appeal, per Stewart, J.—"Affirmed. The plaint does not state that the defendant wilfully and maliciously injured any property; nor is the Ordinance or clause thereof alleged to be infringed specified."

B. M. Colombo, 9732. The defendant (*J. C. Albrecht*) was charged with having, at Chatham Street, Fort, on the 18th of May, 1874, sold two pints of beer without a license, in breach of the 10th clause of Ordinance No. 7 of 1870. The facts of this case are set forth in the following judgment of the Bench (Messrs. *Vanderstraaten, Coomaraswamy* and *Vangeyzel*): "In this case the defendant is charged with having sold two pints of beer in breach of the 10th clause of the Ordinance 7 of 1873. The Licensing Ordinance.

Licensing Ordinance.

defence is that the pints of beer were given to the complainant's cooly as samples of the beer at the defendant's premises, where it is stated beer is usually sold by the dozen. The Court is satisfied that there was a sale ;—and the fact of two pints (instead of one) of the same beer having been sent by the complainant's cooly, coupled with the retention of the money in the clerk's hands, strongly confirms this view. The point for consideration now is whether the defendant is chargeable for the sale by his clerk—or 'salesman,' as Bartholomeusz himself puts it. The 12th clause of this Ordinance (7 of 1873) throws the burden of proof on the defendant to show 'that he was not privy or assenting to the sale.' To prove this, the defendant has called his clerk, on whose evidence the Court places no reliance. Having then failed to prove that he was not privy or assenting to the sale, and the Court also believing that the beer could not have been sold without his knowledge and consent, the defendant is found guilty of the charge and he is hereby sentenced to pay a fine of Rupees twenty, half of which shall be paid to the complainant as informer's share."

In appeal, (*Ferdinands* for appellant) per CAYLEY, J.—"Set aside and defendant found not guilty. There is no proof that the defendant took part in, or was privy to, the sale of the beer. It is true that the occupier of unlicensed premises is liable to punishment under § 12 of the Ordinance, and the burden of proving that he was not privy or assenting to the sale of liquor therein is thrown upon him. But in the present case, the defendant is not charged under this clause, as the occupier of unlicensed premises, but under the 10th clause as the seller of the beer."

July 21.

Present STEWART, J.

Timber Ordinance.

P. C. Kurunegala, 24156. The defendants were charged with removing timber from a Crown forest without a license, in breach of clauses 2 and 5 of Ordinance 24 of 1848 and clause 2 of Ordinance 4 of 1864. The accused having pleaded guilty, the Magistrate (*Ellis*) sentenced them to pay a fine of Rs. 30 each and to be imprisoned at hard labor for two months.

In appeal, (*Grenier* for appellant, *Clarence* for respondent) per STEWART, J.—"Amended by so much of the sentence as imposes imprisonment with hard labor being set aside. The other part of the sentence is affirmed. The Ordinance 4 of 1864 does not authorise the imposition of both fine and imprisonment. The words

in the 2nd section are 'shall be liable to such punishment by fine *or* imprisonment,' &c. One of these punishments can only, therefore, be awarded."

July 28.

Present Stewart, J.

Cruelty to animals.

P. C. Matale, 6488. The defendant was charged, under clause 1 of Ordinance 7 of 1862, with having beaten and broken one of the horns of a buffaloe. The Magistrate (*Penney*), having recorded a verdict of guilty, sentenced the defendant to pay a fine of Rupees 20 and the complainant's expenses.

In appeal, the judgment was set aside, and per Stewart, J.—"It is not proved that the defendant committed any act of cruelty within the meaning of Ordinance 7 of 1862. From the evidence it would appear that whilst two buffaloes were fighting, the defendant struck a buffaloe of the complainant with a stick, knocking off a horn of the animal. This however is not an act ejusdum generis referred to in and made punishable by the Ordinance. See judgment of the Supreme Court, P. C. Negombo, 22140, December 29th, 1870."

August 4.

Present Stewart, J.

Cattle trespass.

P. C. Colombo, A. The plaint was "that the defendants did, on the 16th July, unlawfully remove from the garden of the complainant two bullocks which were in the actual custody and charge of the complainant, as Vel Vidahn, for trespass committed on the land of Jayesinghe Don David Appohamy." The Magistrate (*Conolly*) refused to issue summons in the following terms: "This plaint is rejected. It seems to be identical with the one quoted at page 9 of Grenier's Reports for 1873, which was disallowed and confirmed in appeal by the Supreme Court as no offence was sufficiently set forth."

In appeal, per Stewart, J.—"Affirmed. It is not alleged that the cattle were rescued from the custody of the law or that the complainant had the bullocks in legal custody. There is besides no provision in the Ordinance 2 of 1835 requiring the headman to take charge of cattle that may have trespassed."

Excessive bail.

J. P. Negombo, 9069. The accused, a Notary, was charged, under clause 21 of Ordinance 16 of 1852 and clause 11 of Ordinance 3 of 1865, with having neglected to send to the Registrar of

Excessive bail. the district certain duplicates of deeds which had been attested by him. The Justice of the Peace *(Liesching)* having required security to the extent of Rs. 3000,* the defendant, who was unable to find bail to that amount, was remanded to jail, and hence this appeal.

Per STEWART, J.—"Altered by the amount of bail required from the defendant being reduced to Rs. 1000, that is to say the defendant in the sum of Rs. 500 and two approved sureties each in the sum of Rs. 250. The offence with which the defendant is charged only rendering him liable on conviction to a fine not exceeding Rs. 200, the amount of bail (Rs. 3000) fixed by the Justice of the Peace seems excessive. It would appear moreover that the appellant remains in custody, being unable to furnish the required security."

Toll. *B. M. Galle*, 3218. The defendant was charged with having passed the Galupiyadde toll-bar, within the Galle Municipality, without paying toll, in breach of the 17th clause of Ordinance 14 of 1867. The Bench (Messrs. Samerewickreme and Goonewardene) held as follows: "The parties in this case agree to the facts, (1) that the defendant is employed in the Public Works Department as an Overseer within ten miles from the toll-bar, (2) that he holds a certificate from his superintending officer, (3) that on the day in question the defendant with his family and friends in two carriages passed the toll-bar without paying toll. The simple question the Bench is called upon to decide is, whether the defendant was justified in taking advantage of this permit and allowing his friends to evade the payment of toll. Under the 7th clause of the Ordinance, those armed with a permit from their superior officers are only exempted, but it no where authorises them to allow their friends and carriages under such permits to pass free; if such were

* The J. P. appended to his order the following explanation. "Summons instead of a Warrant was in the first instance ordered, simply because the J. P. never contemplated that accused would evade process. He did however do so and, as the J. P. believes, wilfully absented himself from his usual place of business, and from the 13th of May last (date of affidavit) till the 24th July (date of surrender) could not be taken up though a Warrant was substituted for the Summons. His house meanwhile had been searched on the 15th May last, proclamation had issued on the 25th June, but it was only after the notarial protocols had been found concealed in the house of a third party, who stated that accused had left them there, that the latter found it convenient to surrender. The J. P. at first contemplated refusing bail altogether, but on further consideration fixed the bail at Rs. 3000."

the case it would be only opening a way for fraud and for depriving the renters of a large amount of their revenue. The defendant's conduct is inexplicable, and he is guilty of a breach of the Toll Ordinance. He is fined Rs. 25." Toll.

In appeal, the defendant urged in his petition "that in moving from one station to another, he was free from toll not only for himself but for his goods, his family and his servants." He further submitted an affidavit in which he distinctly alleged that "no one save and except himself and the members of his household had passed the toll-bar on the day in question."

Per STEWART, J.—"Affirmed. These vehicles were not employed in the construction or repair of a road or other works, so as to bring them within the exemption from toll provided in the latter part of the 7th section of Ordinance 14 of 1867. It would be seen on reference to this clause that the exemption in respect of road officers, &c., is not so extensive as that contained in the first part of the clause."

P. C. Jaffna, 6013. This was an appeal against a conviction in a maintenance case in which the defendant had been sentenced as follows: "Fined Rs. 10, the whole of it to go to complainant if paid. In default of payment accused must be imprisoned at hard labor for two weeks." Maintenance.

In appeal, per STEWART, J.—"Affirmed. There is sufficient evidence to sustain the conviction that defendant neglected to maintain his child. The sentence, so far as regards the imprisonment of the defendant in default of payment of the fine, is set aside. If the fine is not paid, the Court should proceed in the manner prescribed by Ordinance No. 6 of 1855."

P. C. Panadure, 22767. The defendant, a peace officer, was charged with having frivolously and vexatiously seized and kept in custody the complainant's carts and bullocks, in breach of the 167th clause of Ordinance 11 of 1868. The Magistrate (*Green*) convicted the accused and fined him Rupees 50. Illegal detention of property by native headmen. Jurisdiction.

In appeal, the proceedings were quashed, and per STEWART, J. —"The charge is laid under the 167th section of Ordinance 11 of 1868, which renders the defendant liable 'to such punishment by fine or imprisonment, with or without hard labor, as the Court before which such conviction shall be obtained, shall think proper to award.' By the 119th section, to give the Police Court jurisdic-

tion in such a case, the election of the Queen's Advocate to prosecute was necessary. The proceedings do not shew that the required election was made."

Cattle trespass.

P. C. Ratnapura, 14720. This was a charge of cattle-trespass under the 4th clause of Ordinance 2 of 1835. It was proved by the prosecutor and his witnesses (none of whom were cross-examined) that two buffaloes belonging to the accused had broken through a fence, which was described by the Aratchie of the village as " a good one," and had damaged a young cocoanut plantation, belonging to Mr. Charles de Soyza and in charge of the complainant. For the defence two other Aratchies were called, who deposed that, having been sent by the Ratamahatmeya to enquire into the alleged trespass, they had found that the fence " was not strong enough to keep out cattle according to the local way of fencing," and " was not fit according to local custom to keep out cattle." The Magistrate (*Nevill*), evidently believing this evidence, acquitted the defendants in the following terms: " It is clear the fence was not good enough according to local custom to keep out cattle."

In appeal, (*Ferdinands, Layard* with him, for complainant and appellant) the judgment was set aside and case remanded for further hearing; and per Stewart, J.—" According to the complainant, the portion of land trespassed upon, which appears to form part of a larger tract, was properly fenced. Neither this witness nor the 2nd, the local Aratchy, who expressly testifies that the fence was a good one, was cross-examined, or any questions put suggesting that the land was not fenced according to local custom. The witnesses called for the defence did not go to the land, and that in the absence of the complainant, until eleven days after the trespass; nor does it clearly appear that they speak of the same portion of land referred to by the complainant, and of the identical fence through which the buffaloes broke and entered. In coming to a conclusion whether the portion of land was duly fenced as required by custom, the Magistrate should bear in mind that scarcely any fence of the kind ordinarily existing can afford effectual resistance to buffaloes, impelled by hunger to enter a cultivated enclosure. Enquiry should be specially directed to the state of the fence through which the buffaloes entered. Both parties to be at liberty to call further evidence."

Maintenance.

P. C. Panadure, 21163. The defendant was charged with not maintaining his illegitimate child, in breach of clause 3 of Ordinance 4 of 1841. Two previous cases (19096 and 19453) had been instituted against the accused for the same offence, but in both he had been acquitted, not however on a distinct finding that he was not the father of the child. The Magistrate (*Green*) held as follows: "This defendant has already been prosecuted by this woman, but has hitherto escaped conviction owing to complainant's bad character and insufficient evidence. In this case also the evidence is meagre, but I have carefully examined the child, and his likeness is so strong to defendant, especially in the formation of the ears, eyes and eyebrows, and the broad forehead, that I cannot but conclude that defendant is the father. The child was quite small when the case was tried before, but now he is 3 years old. It is seldom a father is more like his child than in this case. I therefore believe the complainant's story to be in the main true —and if defendant is the child's father he must maintain it, whatever be the mother's character. Defendant is found guilty and sentenced to pay a fine of Rupees 10, half to complainant."

In appeal, (*Ferdinands* for appellant, *Grenier* for respondent) per STEWART, J.—"Set aside and case remanded for further hearing and consideration. The Magistrate admits the evidence to be meagre, and apparently founds his judgment chiefly on the likeness of the child to the defendant. But likeness is a very deceptive test, and in this case the fact of the complainant and defendant being relations may to some extent account for the resemblance on which the Magistrate has so much relied. The Magistrate's special attention is requested to the judgment of his predecessor in the case No. 19453. The defendant having been away in Kandy for several months previous to the birth of the child, and no communication seemingly having taken place between the parties from the time of the defendant's departure from the village, are circumstances not to be overlooked in determining how far the complainant's evidence is to be credited. Unless the evidence be of such a character as to leave no reasonable doubt of the defendant being the father of the child, he should not be convicted."

August 11.

Present SIR RICHARD MORGAN, C. J.

Arrack Ordinance.

P. C. Kalutara, 50759. The plaint was "that the defendant did, from the 1st July, 1873, up to this day, at Manana, cause

Arrack Ordinance.

arrack to be sold by retail on his own account, contrary to the tenor of his license, in the Crown land called Manantodowa, against the 26th section of Ordinance 10 of 1844." On the case for the prosecution being closed, the defendant called evidence and produced his license from the Government Agent. The Magistrate (*Power*) held as follows: "It appears that the tavern now stands in a land bearing the same name as the land in which it stood in former years, and the question arises as to whether a renter has the power to move his tavern about, though it may be still kept on the same land, without special permission. By the defendant's license, he is enabled to sell arrack at '*the* tavern No. 7 in Mananawatta and at no other place.' This would imply that the Government Agent had specially named one building, the tavern No. 7, and that to this tavern and not to a new one must the renter go. And the reason is clear: if the tavern is to be moved about at the renter's wish, the public for whose benefit they are created would not know where to go. I am of opinion that the defendant has committed a breach of the 26th section of Ordinance 10 of 1844, in that he has sold contrary to the tenor of his license, for he has sold at a place other than that hitherto known as the tavern No 7. He is found guilty and fined Rs. 50."

In appeal, the judgment was set aside, and per MORGAN, C. J. —"The defendant was licensed to sell arrack 'at the Tavern No. 7 in Mananewatte and at no other place.' This would imply, according to the Magistrate, that the Government Agent had specially named one building, the Tavern No. 7; but there is no evidence to support this implication. The removal was to an adjoining land bearing the same name,—probably a part of the same land and nearer to the high road. The defendant states that the number is not that of the house but of the license of the tavern, "as every arrack rent contains a number of taverns and each tavern has a distinctive number.' This may or may not be the case; but, where the charge is one so obviously frivolous as this, complainant should have adduced strict affirmative evidence in support of it."

False information.

P. C. Galle, 88833. The plaint was "that the defendant did, at Galle, on the 9th day of May, 1874, wilfully give false information to L. F. Lee, Esq., J. P., with intent to prevent the detection of an offence; that is to say that the defendant did falsely state 'I did not say in the presence of Mr. Keegel, (meaning the complain-

False information.

nant) that I did not sign the libel,' (alluding to the libel filed of record in D. C. case 35586), in breach of clause 166 of Ordinance 11 of 1868."

In appeal, against a conviction by the Magistrate (*Lee*), the judgment was set aside; and per MORGAN, C. J.—" The accused in this case was summoned and examined as a witness. If the evidence be false, he is liable to be tried for perjury, but he cannot be proceeded against under the 166th section of the Ordinance, which applies only to persons who voluntarily tender false information. (See decision in Police Court Kurunegala, No. 11798, Civil Minutes, November 11, 1869. Vanderstraaten's decisions, p. 23.) The proceedings should be forwarded to the Queen's Advocate for that officer to consider whether accused cannot be indicted for perjury."

Police Ordinance. Wilful culpable neglect of duty.

P. C. Ratnapura, 14737. The defendant (a Police Inspector) was charged with having, on the 15th of June, unlawfully arrested the complainant and illegally confined him at the Ratnapura Police Station till the 17th of June, in breach of clauses 55 and 70 of Ordinance 16 of 1865. The Magistrate (*Nevill*) having refused a postponement, which the accused had applied for on affidavits, proceeded to try the case and delivered the following judgment: " There is no ground for conviction under the 55th clause, and I think the Sergeant is as fully entitled to credit as complainant; and it is clear he acted throughout under defendant's orders. But under the 70th clause, I consider the evidence shows ' wilful culpable neglect of duty' by defendant, in not bringing complainant, who was in his custody from 9 a. m. to 7 p. m. on the 15th, and from 7. a. m. on the 16th until 10 a. m. on the 17th, without a warrant, before a magisterial officer as therein provided. And defendant is found guilty of a breach of the 70th clause of Ordinance 16 of 1865. I think there being no proof of malice or corrupt motive, it is fair to assume defendant acted either through carelessness or incapacity, though the Sergeant's assertion that he was directed by defendant not to produce complainant before this Court on the 17th, coupled with the fact that complainant was detained the whole day on the 15th ultimo at the Police Station in Ratnapura, where a Police Court sits daily and an official Justice of the Peace resides, is proof that defendant knew he had not enough grounds at law to justify complainant's detention. Carelessness or incapacity in a Police officer when it leads to a breach

Police Ordinance. Wilful culpable neglect of duty.

of the law and interferes with the liberty of the public is matter for severe punishment. I think, however, complainant's personal wrongs can best be redressed by a civil action, and I award penalty only for the breach of the law in its public aspect. Defendant is sentenced to a fine of Eighty Rupees, being Rs. 6. 8 cents less than one month's pay."

In appeal (Grenier for appellant) per Morgan C. J.—"Set aside, and defendant acquitted. He was entitled to a postponement to produce evidence to justify his detention of the complainant. But the Supreme Court sees no reason to remand the case for the purpose of hearing evidence for defendant, as the evidence for the complainant is not sufficient to secure a conviction for 'wilful culpable neglect of duty.' The Magistrate finds that there is no proof of malice or corrupt motive, and that it is fair to assume that defendant acted either through carelessness or incapacity. When Police officers act bona fide in the execution of their duty, and with a view to the detection of crime, they are entitled to reasonable protection. It would be otherwise if there is the slightest reason to believe, which there is not in this case, that they act maliciously, oppressively or corruptly. The complainant was arrested and detained on suspicion of being concerned in a case in which warrants came from Colombo for the arrest of certain persons. 'It was said,' complainant himself states in his examination, 'that rice had been stolen in my cart.'"

Excessive fine.

P. C. Kalutara, 50907 *and* 50909. These were appeals against a conviction for assault by the Magistrate (*Power*) who sentenced the defendants to pay a fine of Rs 50 each.

In appeal, (*Ferdinands* for appellants) per Morgan, C. J.—"Affirmed. These are cross cases by parties engaged in a mutual quarrel. But the Supreme Court considers the fine of Rs 50 on each accused, or Rs 350 in all, excessive. Five rupees each would have been quite sufficient for the ends of justice."

Master Attendant's Ordinance.

J. P. C. Colombo, 35. The plaint was "that the defendants did, on the 27th instant, in the roadstead of Colombo, go alongside and communicate with the barque *Dorothy*, before she was visited and reported on by the Health Officer of the port, in breach of the 11th clause of the Port Regulations and the 34th clause of Ordinance 6 of 1865." The only evidence in the case was that of the complainant, who being sworn stated;—"I am a Dubash of the

Master Attendant's Ordinance.

port of Colombo. When the Barque *Dorothy* was off the port about 6 or 7 miles standing in towards the roads about 7.30 yesterday morning, I was at the Flagstaff and observed through a telescope that a canoe was alongside of the vessel. After that I came down to the wharf and went off in my canoe. I overtook the Pilot and the Health Officer about the ballast ground. I pointed out to the Pilot that there was a canoe alongside of the vessel, which was then nearly two miles off. On getting close to the ship I saw that the canoe was No. 38 and the accused were in her. 1st accused is a runner employed under Mr. Morris and the 2nd accused is tindal of the canoe. When I came up to them they were alongside of the ship, about 8 or 9 yards off her side, sufficiently near to speak to any one on board. The canoe No. 38 was not fast to the ship. and I can't say whether she had been fast to her or not No person in the canoe had been on board of the vessel. I did not hear any questions pass between the accused and the captain of the ship." The Magistrate (*Donnan*) acquitted the accused in the following terms: "In this case I don't consider that any breach of the law has been committed. I interpret the 11th clause of the Port Regulations in this way.—'communication' to mean the making fast of the boat to the ship, any person stepping on to the ship's side out of a boat, or going on board, or any person going from the ship into the boat, or any parcel or letter handed from the ship to the boat. or vice versa; and 'going alongside' to mean the boat being sufficiently close to the ship for any person to jump on board or on to the ship's side from it. There being no evidence to prove either of these on the part of the accused, they are discharged."

The following is an exact copy of the Port Regulation in question.

"No boat whatever, except the Government Port Boats, shall communicate with or go alongside of vessels in the offing until after they have cast anchor in the roadstead in a proper berth, and been visited by the Health Officer of the Port, and reported by him to be free from infection, which shall be made known by the vessel's ensign being hoisted at the fore. The Tindal, or person acting as Tindal of any boat, and all persons aiding and abetting him, offending against this rule, shall be liable to the penalty imposed by law, in addition to the suspension of the Tindal's license and that of the boat." (*See Proclamation of 6th January*, 1866.)*

* This Regulation has since been superseded by another to the following effect: "No person, except belonging to the Master Attendant's Department, shall go on board, or land from, or put anything on board, or take anything from any vessel in the offing or arriving within the port, and no

Master Attendant's Ordinance.

In appeal, (*Grenier* for appellant) per MORGAN, C. J.—"Set aside and the defendants condemned to pay a fine of Rs. 20. There is ample evidence to shew (and it was not disbelieved) that the defendants went alongside the vessel, whilst in the offing and before she had cast anchor, and even to support the charge of communicating with her, and both are prohibited by the 11th section of the Port Regulations of the 6th January, 1866. Complainant cannot be reasonably expected in a case like this where the vessel communicated with was at a distance to adduce stricter evidence than he has adduced."

Labor Ordinance.

P. C. Kandy, 98813. This was an appeal against a conviction under the 11th clause of the Labor Ordinance.

Layard, for appellants. The coolies were servants of the proprietor or superintendent of the estate, and were not bound by any contract to the complainant, who was a cangany and from whose service they were charged with having deserted. [MORGAN, C. J.—The defendants are represented in the evidence as bound to serve " under the cangany."] They were none the less the servants of the superintendent. But even assuming they were the cangany's servants, there is no proof whatever that he received no notice.

Per MORGAN, C. J.—" Affirmed. It was urged in appeal that there is no evidence to shew that no notice was given to the complainant. But although the charge is preferred by a cangany (as a rule this should be discouraged, for the superintendent is really the complainant) the evidence shews that the coolies were employed to serve under the cangany."

August 21.

Present MORGAN, C. J.

Cattle trespass.

P. C. Chavakachcheri, 24420. The charge was laid under clause 4 of Ordinance 2 of 1835. The defendant, admitting the trespass, pleaded that the fence was in bad order, but he adduced

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boat, except the Government Port Boat, shall make fast to any such vessel until after it has cast anchor in a proper berth, and been visited by the Health Officer of the Port, and reported by him to be free from infection, which shall be made known by the vessel's ensign being hoisted at the fore. The tindal, or person acting as tindal of any boat, or any other person offending against this rule, shall be liable to the penalty imposed by law, in addition to the suspension of the tindal's license and that of the boat." (*See Gazette of 12th September*, 1874.)

no proof on this behalf. The complainant and his witnesses stated that the fence was in general good order, excepting as to gaps which were made by trespassing cattle, which gaps however were daily repaired. It was admitted on the part of the prosecution that there were gaps, as alleged, on the southern side of the Estate, on the day in question; and the complainant was unable to say whether these gaps had been caused by the defendant's cattle. The Magistrate (*Drieberg*) acquitted the defendant, on the grounds that the fence was not in good order, as required by the Ordinance No. 2 of 1835, and that there was no proof that the cattle of the defendant had broken through the fence. Cattle trespass.

In appeal, per MORGAN, C. J.—"Set aside and defendant awarded to pay a fine of Rupees 5, half of which shall be paid to the complainant. The complainant deposed that the fence 'was in good order, except such damage as was done to it by trespassing cattle, which was daily repaired.' The condition of the Ordinance as to fence is as fully and as reasonably complied with, in this instance, as it is possible for owners of large Estates to comply with the same."

P. C. Balapitimodera, 45290. A verdict of acquittal by the Magistrate (*Gibson*), on a charge of gambling, was reversed in appeal in the following terms:—"Set aside and the 1st defendant sentenced to be imprisoned for one month under article 4 of section 4 of Ordinance 4 of 1841. The Magistrate believes that the defendant was gambling on the day in question and that he had gambled before, but that it had not been shown that the gambling occurred in a public place or that the house in question had been kept or used for the purpose of gambling. There is abundant evidence to establish the latter fact. Complainant swears that he had once before gone to seize gamblers in 1st defendant's house but that they ran away; Jandris, that he had seen gambling 3 or 4 times in that house before and that the house was the residence of the defendant; Babba Appu, that people were in the habit of going there promiscuously for gambling, he had often seen gambling in the house; Maliar Mendis, that he had seen gambling going on twice in 1st defendant's house, he had seen people going to gamble there. It is open to the complainant to proceed further against the 1st defendant, under section 19 of the Ordinance, for keeping a house for the purpose of common or promiscuous gaming. The Court should not consider this case as having been closed, except as regards the 1st defendant. Process should still issue Gambling.

Gambling.

against the 2nd, 3rd and 4th; and when they are apprehended, they should be tried."

August 28.

Present MORGAN, C. J.

Labor Ordinance.

P. C. Newera Eliya, 9133. The plaint was "that the defendant did, on the 10th July, 1874, behave himself in an insubordinate manner, in breach of the 11th clause of the Ordinance No. 11 of 1865." The Magistrate (*Hartshorne*), having convicted the accused, sentenced him to one month's imprisonment at hard labor.

In appeal, Grenier for appellant. The plaint was defective in not describing the defendant as a monthly servant and the omission was not supplied by the evidence. [MORGAN, C. J.—But the complainant has distinctly sworn that the accused was his "head cangany."] A "head cangany" might or might not be a monthly servant. If he was under a written contract to serve for more than a month (as was often the case) the 11th clause of the Ordinance would not apply. So serious a defect in the charge could not be cured by a mere inference, which at best was uncertain.

Sed per MORGAN, C. J.—"Affirmed. The conduct of the defendant was grossly insubordinate. It was contended that the plaint did not shew that he was a monthly servant, but he was charged with the offence in breach of the Ordinance 11 of 1865, and the complainant swore he was complainant's head cangany. The objection was not taken either in the Court below or in the petition of appeal."

September 4.

Present MORGAN, C. J. and CAYLEY, J.

False information.

P. C. Chavakacheri, 24631. The plaint was "that the defendants did, on the 19th May, 1874, wilfully and maliciously give false information to the Justice of the Peace, in case No. 2217, with intent to support a false accusation of Cattle-stealing against the complainant—the information was also false to their own knowledge, in breach of Ordinance 11 of 1868, clause 166."

In appeal, against a conviction by the Magistrate (*Drieberg*), *Grenier*, for appellants, contended that the plaint was defective in not setting forth the false information complained of.

Per MORGAN, C. J.—"Set aside and proceedings quashed. The plaint does not specify the false information which the defendant is alleged to have given. The proceedings ought to be

referred to the Queen's Advocate for that officer to consider the propriety of putting the accused on their trial for conspiracy and perjury." False information.

September 11.

Present MORGAN, C. J. and CAYLEY, J.

P. C. Colombo, 15101. The plaint in this case was "that the defendant (a prison overseer) did, on the 1st of June, 1874, fail to perform his duty and did wilfully neglect and disobey a lawful order made in respect of the Slave Island prison to which he was at the time attached, by absenting himself from duty without leave and failing to escort a party of prisoners under his charge to the work at the Breakwater at the usual hour; and further for continuing so to absent himself without leave to this day, in breach of the 20th clause of the Ordinance 18 of 1844." Prisons Ordinance.

For the defence it was contended in the Court below that the Ordinance did not apply to the case, as the Slave Island jail had not been duly proclaimed a public prison. The Magistrate (*Conolly*) however held as follows:—"I consider the Slave Island prison does come under the Ordinance of 1844. I must presume that the prison has been duly proclaimed in the absence of any proof to the contrary. The accused is fined Rupees 20 for absenting himself on the 1st instant."

In appeal, per CAYLEY, J.—"Set aside and defendant adjudged not guilty. The charge is laid under the 20th clause of Ordinance 18 of 1844, but at the time of the alleged offence the provisions of that Ordinance were not applicable to the Slave Island prison, that prison not having been proclaimed. The case stood over in order to ascertain whether this prison had been at that time proclaimed, and it now appears that such is not the case."

September 15.

Present CAYLEY, J.

P. C. Balapitimodera, 45412. The plaint was "that the defendant, being able to maintain his child, did since the last three weeks leave his said child, without maintenance, so that it required to be supported by others, in breach of the 3rd clause of Ordinance 4 of 1841." The Magistrate (*Gibson*) held as follows: "I have no doubt but that this defendant lived with complainant, and believe most probably he is the father of her child. The defendant is a man of influence, and, as was shewn in a Justice of the Peace case which was investigated by me, the whole influence of Bentotte is concentrated against complainant's family, so much so that they were obliged to quit the place. Maintenance.

Maintenance. Complainant's father is a Tamil, and that will partly account for the inhabitants of Bentotte taking part against them. However, so many respectable witnesses have been called who state that the complainant was on very intimate terms with Sinno Constable, that I am inclined to think that there may be some truth in what they say. Under these circumstances, it is impossible to convict the defendant, and he must be discharged."

In appeal, per Cayley, J.—"Set aside and case sent back for a new trial. In this case the Police Magistrate seems to have no doubt that the complainant was defendant's concubine. If this relation was subsisting at the time when the child must have been begotten, it raises a strong presumption that the defendant is the father, and the complainant herself swears that such is the case. The Police Magistrate however considers the paternity not proved, because there is evidence that one Sinno was in the habit of visiting the woman. It is not however satisfactorily shewn that the visits of Sinno took place at such time as to render it possible that he could have been the father of the child. The evidence, as to the time during which Sinno's visits were made, and as to the time of the birth of the child, is insufficient, by reason of its indefiniteness, to rebut the presumption above referred to, strengthened as it is by the complainant's own evidence, which the Police Magistrate does not appear to disbelieve. The question is one of the sufficiency of the defendant's evidence to rebut the presumption and evidence in complainant's favor: not a question as to its credibility. This is a question of law and not of fact, and consequently is one with which the Supreme Court can deal. The case is sent back for a new trial and not for a further hearing, because a considerable part of the evidence called by the defendant was inadmissible, and ought not to have been received; such as the evidence of statements made by Sinno's wife and the evidence of the popular rumours prevailing in the district."

September 18.

Present Cayley, J.

Furious driving. *P. C. Colombo*, 16282. The plaint was "that the defendant did, on the 27th May last, at Slave Island, furiously drive a waggon and thereby injure complainant's right foot, in breach of the Ordinance 16 of 1865, clause 83." The Magistrate (*Conolly*) held as follows: "I believe defendant drove carelessly and furiously on the occasion in question. He is fined Rupees 30. Complainant's expenses must also be paid by de-

fendant. Of course complainant has got his civil remedy also." — Furious driving.

In appeal, Grenier for appellant. The plaint was essentially defective in not reciting that the driving was "to the danger and terror of passengers,"—words which constituted the gist of the offence as created by the Ordinance. [CAYLEY, J.—The Magistrate has found the defendant guilty of "careless" as well as "furious" driving, and the words you refer to do not occur in the first part of the clause.] But the conviction must be limited to the charge, which was for "furious" and not "careless" driving, and which as recorded in the plaint disclosed no legal offence. Nor did the evidence supply the omission. [CAYLEY, J.—It appears that the driving complained of was during day and when there were passengers on the road who could not but be endangered by such driving. The objection is a purely technical one and the defect to which it applies cannot be taken to have prejudiced any of the substantial rights of the accused.]

The judgment was affirmed.

September 22.

Present CAYLEY, J.

Paddy Ordinance.

P. C. Galle, 89454. Held that the mere fact that the Renter's agent knew of the cutting of a crop and did not remonstrate, would not obviate the necessity of the notice required to be given by the cultivator under the Paddy Ordinance 14 of 1840.

September 29.

Present CAYLEY, J.

Jurisdiction.

P. C. Matale, 7669. The plaint was "that the defendant did, on the night of the 7th September, assault and beat the complainant and rob him of a silver watch on the road near the Hulangame Bana-madua." The Magistrate (*Templer*) held the charge proved, and sentenced the defendant to three weeks' hard labor and to pay a fine of Rs 20.

In appeal, the defendant urged that the offence disclosed in the proceedings was that of highway robbery and as such was beyond the jurisdiction of the Police Court.

Per CAYLEY, J.—"Affirmed. The charge is one of robbery and the evidence of the complainant discloses a charge of theft from the person."

October 6.

Present MORGAN, C. J., and CAYLEY, J.

Evidence. Doubt.

P. C. Gampola, 26334. The Magistrate in this case had

Evidence. Doubt.

mitigated the sentence, apparently on the ground that he had some doubt as to the truth of the charge.

In appeal, the judgment was set aside and case sent back for further hearing and consideration; and per Cayley, J.—"If the doubt is a reasonable one, the defendant ought to have the benefit of it and be acquitted. If it is merely such a doubt as might arise in any case from the fact of no human testimony being absolutely certain, and is not founded upon anything which appears unsatisfactory in the evidence itself, the conviction should stand. The Police Magistrate must decide whether or not his persuasion of the guilt of the defendant amounts to a moral certainty beyond all reasonable doubt. If it does not, he should acquit altogether, and not merely mitigate the sentence. The doubt however must be a reasonable one, and physical certainty is not necessary; for, as Best observes, (Principles of Evidence, p. 123, 5th ed.) the physical possibility of the innocence of any accused person can never be excluded."

October 16.

Labor Ordinance

Present Morgan, C. J., Stewart and Cayley, J. J.

P. C. Kandy, 99114. Ten coolies were charged, under the 11th clause of the Labor Ordinance, with having left without notice the service of the complainant, a cangany. The Magistrate (*Patterson*) convicted the defendants in the following terms: "It is perfectly clear, and the evidence of defendants' witnesses, reluctant as it was, strengthens the supposition, that defendants were all working under complainant in his gang, were paid off on Soyza's Estate which they left with complainant, and, going with him to Roseneath Estate, deserted his service there without notice or reasonable cause, at the instigation, I have no doubt whatever, of their witness, the conductor on the former Estate."

In appeal, (*Ferdinands* for appellant) the judgment was set aside and the defendants found not guilty; and per Cayley, J.—"There is nothing to shew that the relation of master and servant subsisted between the complainant and the defendants. The agreement between the parties seems to have been that both complainant and defendants should enter the service of another master, after leaving Soyza's Estate, the defendants as coolies and the complainant as their cangany; not that the defendants should become the servants of the complainant."

Labor Ordinance.

P. C. Pusilawa, 9510. The plaint in this case charged two

coolies with having deserted from the service of the complainant, who was a cangany. The Magistrate (*Ievers*) acquitted one of the accused (a woman), and convicted the other, in the following judgment: " The complainant produces his check roll. The 2nd accused has worked three days at end of July to a few days in August. He evidently came away from the Railway station and engaged himself on Rothschild Estate and then returned to the Railway station." Labor Ordinance.

In appeal, (*Ferdinands* for appellant) per CAYLEY, J.—" Set aside and case sent back for a further hearing. It is not clear from the evidence whether the appellant was a servant of the complainant, the cangany, or a servant of the proprietor or superintendent of the Rothschild estate. If the latter, he cannot be convicted of leaving the cangany's service."

P. C. Balepitimodera, 45785. This was an appeal against an acquittal on a charge of theft. Theft.

Per MORGAN, C. J.—" Set aside and case remanded for the Police Magistrate to hear evidence and give judgment *de novo*. The defendants were charged with stealing sugar cane and yam from the complainant's garden. On the day of trial the 2nd defendant admitted having cut and removed the cane and yam, but said he had a right to them, and that he had married complainant's daughter. The Magistrate thereupon referred the complainant to a civil suit and discharged the defendants. This was irregular. There must be more evidence to satisfy the Court that the claim is *bona fide*, and the Court should not refuse to hear a case simply on the statement of a party that he claims the land."

October 20.

Present STEWART and CAYLEY, J. J.

P. C. Chilaw, 10071. This was an appeal by complainant against the alleged inadequacy of a sentence under clause 11 of the Game Ordinance, the full penalty of Rupees 50 not having been inflicted by the Magistrate. Game Ordinance.

Per STEWART, J.—" Affirmed. Reading the 2nd sub section of clause 11 of Ordinance 6 of 1872 with the 1st sub-section of that clause, the Supreme Court thinks that the words ' shall be liable to a fine of Rs. 50' give the Court a discretion as to the sum to be imposed as a fine within the amount specified. The words in the 2nd sub-section ' shall be liable to a fine of not less than Rs. 50' clearly leave the Court no discretion; and we must

Game Ordinance.

conclude that a distinction was intended to be drawn by the different wording in these two sections which follow each other."

P. C. Gampola, 26319. Held, by STEWART, J., that where a defendant is fined, it is not in the power of the Magistrate to bind him over to keep the peace. "The remedy provided by the 104th section of Ordinance 11 of 1868 is not cumulative. The Magistrate should keep his functions as Justice of the Peace distinct from his duties as Police Magistrate."

October 27.

Present STEWART and CAYLEY, J. J.

Jurisdiction.

P. C. Galle, 89553. The proceedings in this case were quashed; and per CAYLEY, J.—"This is a charge of horse-stealing, and as such was beyond the jurisdiction of the Police Court."

Vagrant Ordinance. Petition drawers.

P. C. Kandy, 99202. The following judgment of CAYLEY, J., explains the facts of the case: "Set aside so far as relates to the appellants, who are adjudged not guilty. These appellants have been found guilty of being found in the Police Court premises for an unlawful purpose, in breach of the 6th sub-section of section 4 of Ordinance 4 of 1841. It appears that they are petition-drawers, who are in the habit of frequenting the Police Court for the purpose of plying their occupation. There is also evidence that they are in the habit when about the Courts of taking money from suitors under the false pretence of assisting them in their cases, and one of the witnesses states that the 2nd defendant is always instituting false cases, and by that means extorting money; and he gives an instance in which he was induced to pay 2nd defendant Rs. 15 to compromise a false case. That Courts should be infested with persons of this kind is no doubt a great evil; but offences such as obtaining money under false pretences, and instituting false charges, are otherwise punishable, and the question the Supreme Court has to determine is whether the case is one provided for by the sub-section of the Ordinance referred to. It appears to the Supreme Court that a Police Court which is open to the public cannot be regarded as a dwelling house, ware-house, godown, stable, out-house, or other building, in the sense contemplated by the sub-section in question. The Supreme Court thinks that the meaning of the words 'other building' must be limited to buildings of a similar class to those specified in the preceding part of the clause,

and cannot be held to extend to such a building as a Court of Justice, which is of an entirely different character, and is open to the public generally." (*Ondaatje* for appellants.) Vagrant Ordinance. Petition drawers.

October 30.

Present MORGAN, C. J., STEWART and CAYLEY, J. J.

P. C. Navalapitiya, 19243. The proceedings in this case were quashed; and per MORGAN, C. J.—"The defendants are charged with 'crimping' two coolies. There is no such word in the Ordinance. The act complained of should be distinctly specified, so as to disclose an offence within the Ordinance." Labor Ordinance. "Crimping."

November 3.

Present MORGAN, C. J., STEWART and CAYLEY, J. J.

P. C. Kandy, 99453. The defendant was charged with "defrauding the Government by selling arrack in glasses, instead of with a standard measure," and also with "using or attempting to use in his tavern a measure of capacity not in conformity with the established standard, in breach of the 5th clause of Ordinance 2 of 1836." Arrack Ordinance.

In appeal, against a conviction, (*Grenier* for appellant) per CAYLEY, J.—"Set aside. It is not proved for what description of measure the defendant used the tumbler" (seized by the complainant); "nor is it proved that this tumbler was not in conformity with any of the standards of capacity established by the Ordinance 2 of 1836. If the defendant by means of this tumbler sold arrack at a higher or lower price than his license authorized, he is liable to prosecution under the Arrack Ordinance. It also appears that the case is one of cheating, but he is not charged with that."

P. C. Galle, 89623. This was a case of maintenance in which the defendant was acquitted, the Police Magistrate (*Blyth*) holding that "if complainant elects to live apart from her husband, without reasonable case, she has no cause against him for not maintaining her." Maintenance.

In appeal, per STEWART, J.—"Affirmed. The Supreme Court must conclude from the finding of the Magistrate that he did not think that there was sufficient ground for concluding that the complainant would be ill-treated by the defendant."

P. C. Jaffna, 6441. The complainant, who was entrusted with a warrant to seize a large number of persons for being defaulters under the Road Tax Ordinance, arrested one Sathasivam, in attempting to do which he was assaulted by the Commutation Rate.

Commutation Rate.

defendant, Velan. The defendant thereupon was charged with resisting the complainant in the lawful execution of his duty as a Fiscal's process-server, in breach of the 23rd clause of Ordinance 4 of 1867. The Police Magistrate (*Livera*), after trying the case under the certificate of the Deputy Queen's Advocate, acquitted the accused in the following terms: "A warrant should have been issued against each of the defaulters. The authority under which the complainant attempted to arrest Sathasivam (No. 161 in the list) is invalid. Complainant can prosecute the accused for assault, but not for resisting him in the execution of his duty."

In appeal, per CAYLEY, J.—"Affirmed. The Supreme Court concurs with the Police Magistrate in considering the warrant invalid. It purports to be a warrant for the arrest of 325 persons appearing in an annexed list. The names of the persons to be arrested are not mentioned in the warrant itself; but a document is attached to it by a wafer, containing a list of 325 names. There is nothing on the face of the document to shew that this list is the one referred to in the warrant. It is not even signed by the Police Magistrate. In the case of warrants of this kind, there could be no safeguard against a dishonest process-server appending any list of names he pleased. There is no objection in cases of this kind to the insertion of more names than one in the warrant itself; but they should not be given in a separate document."

Practice. "S. O."

P. C. Matale, 7651. The Police Magistrate (*Penny*) made the following order in this case: "Accused absent. Complainant has not had them pointed out to server. S. O." An appeal was taken on the ground that the accused were evading summons, and that as the return of the Fiscal was not received, it did not appear whether the summons had been served or not. The Magistrate reported on this petition as follows: "Complainant made no statement to me that the accused were evading summons. If he had done so and shewed good proof, I should have granted him a warrant for their arrest."

Per CAYLEY, J.—"Set aside and summons to reissue. The absence of the defendant on the day of hearing is no ground for dismissing the case, which this Court supposes was intended to be meant by the letters S. O."

November 6.

Present MORGAN, C. J. and CAYLEY, J.

Theft.

P. C. Galagedera, 20416. The defendants in this case were

Theft.

charged with stealing two bunches of cocoanuts; and for breach of the 1st clause of Ordinance No. 7 of 1862. The Magistrate held as follows: "The 1st defendant is found guilty of taking cocoanuts from a garden in the possession of the complainant. It is true that he claims a right to some of the trees in this garden, but his coming there at night is sufficient to show the Court that he came with a thievish intention. He is sentenced to pay a fine of ten rupees, or in default to fourteen days' imprisonment at hard labor. The 2nd defendant is found not guilty, and is discharged."

In appeal, the judgment of the Court below was affirmed.

November 10.

Present MORGAN, C. J., STEWART and CAYLEY, J. J.

Ferocious dogs.

P. C. Colombo, 15334. The defendant was charged with keeping and having in his possession a ferocious dog unsecured and at large. The Police Magistrate (*Conolly*) found the defendant guilty, holding that the defendant being aware of the ferocious nature of the dog ought to have kept it under proper restraint and control, and that having failed to do this he was criminally liable. Defendant was fined Rs. 20, and condemned to pay complainant's expenses; in default of paying the fine, he was sentenced to be imprisoned for one month.

In appeal, per MORGAN, C. J.—"Affirmed. Letting a ferocious dog go at large, the owner knowing its malicious propensity, is an offence at common law. 3 Chitty's Criminal Law, page 643; 1 Russell on Crimes, 452; Carpzovius, part 3, page 333. The last part of the sentence, awarding one month's imprisonment, is set aside. The course prescribed by the Ordinance 6 of 1855 must be followed in such a case."

Toll Ordinance. Castor-seed cake.

P. C. Panwila, 14969. The plaint was "that the defendant, being a collector of tolls at Madewelle, did, on the 2nd day of July, 1874, exact, demand and take a sum of R. 1 for two carts loaded with castor seed cake manure, in breach of the provisions of the 4th clause of Ordinance No. 14 of 1867."

The accused pleaded not guilty, but admitted that he had received toll in respect of two cart-loads of castor seed cake, which he contended was *poonack* under the Ordinance and as such liable to toll. The Magistrate (*Paterson*) held as follows: "Although complainant has ingeniously endeavoured to shew that *castor seed cake* is not *poonack,* and though he has carefully avoided using the word *poonack* when speaking of it, my own opinion is that it does come under the term *poonack,* which I

Toll Ordinance. Castor-seed cake.

imagine is applicable to the refuse of any vegetable substance from which oil has been expressed: in fact it is closely analogous to the English expression "oil-cake." But though holding that castor-seed cake is *poonack*, I should have been strongly inclined to maintain that it is not liable to toll, as it can only be used for manure, so different from the case of cocoanut and gingelly poonack, which are largely used as food for cattle, and which were, therefore, expressly excluded, under the term *poonack*, from exemption from toll as manure; and I believe that when poonack was so excluded only cocoanut and gingelly poonack were then contemplated, and had castor seed-cake been then used as a manure, I fancy special provision would have been made for its exemption from toll, as it is evident that the intention of the Ordinance was only to exclude from exemption such articles as could be used for other purposes than manure. I am, however, prevented from giving effect to this opinion by the decision of the Supreme Court in Kandy, P. C. case No. 73,805 (Beling and Vanderstraaten, part II, page 141) where, though it was shown in the Court below that the particular *poonack manure* was utterly unfit for anything but manure, it was held that the manure in question, being *poonack manure*, was deprived of the exemption from toll, which is granted to manure in general. Under these circumstances, I must hold that defendant was justified in demanding and recovering toll, and he is accordingly acquitted and discharged."

In appeal, (*Browne* for appellant, *Ferdinands* for respondent,) the judgment of the Court below was affirmed.

November 12.

Present MORGAN, C. J., STEWART and CAYLEY, J. J.

Jurisdiction. Bribing the Police.

P. C. Kandy, 99729. The defendant had been found guilty on a charge of attempting to bribe the Police.

In appeal, the conviction was quashed, and the Magistrate directed to take proceedings under the 103rd clause of Ordinance 11 of 1868; and per MORGAN, C. J.—"It was submitted, in support of the appeal, that attempting to bribe a Police Officer is a serious offence and one not within the jurisdiction of Police Courts. The Supreme Court concurs in that view. (Archbold's Criminal Practice, p. 831.) In some cases, where the objection was not taken either before the Police Court or in appeal, and the circumstances were not of a serious character, this Court has not interfered to set aside the finding of Police Courts; but the objection has been taken in this case."

P. C. Balapitimodera, 14149. The defendant was charged with leaving his lawful wife without maintenance, in breach of clause 3 of Ordinance 4 of 1841. The following judgment of the Magistrate (*Gibson*) explains the facts of the case. "I previously acquitted defendant, having thought the marriage took place after the Ordinance of 1847 had come into force. It appears, however, that the marriage took place before, and in that case the fact of registration was not necessary. The publication of banns and subsequent cohabitation was all that was needful to constitute a legal marriage. There is no doubt that banns of marriage between the parties were published, and that they afterwards cohabited together at Ragumma, (defendant's village), and it has been shewn that the complainant was subsequently deserted by the defendant at Madampe. The defendant is found guilty and sentenced to pay a fine of Rs. 10." Maintenance.

In appeal, "Affirmed."

J. P. Colombo, 2624. The affidavit filed in this case by the complainant charged several persons with conspiring to institute a false case against him. The complainant was examined, and from his evidence it appeared that there had been ill-feeling between himself and the persons accused, and that several cases had been instituted by one party against the other. The Police Magistrate (*Conolly*) refused to hear further evidence and bound over both parties to keep the peace for six months. Security to keep the peace.

In appeal, per Cayley, J.—"Order set aside. We do not think that it has sufficiently appeared that the appellant has used threats towards, or otherwise evinced an intention to commit a crime or offence against, the person or property of another, or that the appellant is likely to commit a breach of the peace or to do any act that may probably occasion a breach of the peace. Under the 221st section of Ordinance No. 11 of 1868, the above must be shewn by the oath of one or more credible persons, before an accused person can be called upon to give security to keep the peace, and even then the Justice of the Peace is required to hear any evidence that such accused person may adduce in relation to the charge. (Sec. 222.) In the present case, the Justice of the Peace stopped the case at the close of the appellant's examination, and refused to hear further evidence. It may be observed that a Justice of the Peace has not the power given to a Police Magistrate, by the 104th section of the above Ordinance, to bind over parties to keep the peace in any case where he is satisfied that the ends of justice would be sufficiently met by such a course."

Theft. Disputed title.

P. C. Colombo, 16442. The defendants were charged in the plaint with cutting, stealing and carrying away a tree, the property of the complainant. From the evidence it appeared that the complainant and his mother had been nonsuited in a case instituted by them against the father of the 2nd accused, in respect of the very land on which the tree stood. The complainant proved the cutting of the tree by the accused, and called, among other witnesses, a peace officer who swore that the tree belonged to complainant who had possessed it for 10 or 15 years, that it was a divided land of which the accused held the eastern portion, and that complainant's portion was fenced in. Another witness swore that he had been in charge of the land for 8 years, that he had given evidence against 2nd accused in the civil case, that no claim had been made to the land while he had been in charge of it, that the tree was cut in the day time, and that 2nd accused had said when asked why he was cutting the tree "I am not afraid of you." Accused called no evidence but merely put in the record of the civil case and laid claim to the land. The Police Magistrate (*Conolly*) convicted the accused in the following terms: "There is nothing whatever before me to show that accused claim the land in question. I should acquit accused if there was a particle of evidence to show that any claim or title, however groundless, was set up to the tree or land on which it stands. There is no such evidence, whilst complainant proves that for 8 years, at all events, he has been in uninterrupted possession of the land." The second accused was then sentenced to pay a fine of Rs. 10.

In appeal, per MORGAN, C. J.—"Set aside and the defendant acquitted. The circumstances established in evidence shew that there was no theftuous intent on the part of the defendants. They are liable in an action for civil trespass only."

November 19.

Present MORGAN, C. J., STEWART and CAYLEY, J. J.

Drunk and disorderly.

P. C. Galagedera, 20547. Defendant was charged with having been drunk and disorderly, in breach of clause 53 of Ordinance 16 of 1865. The Magistrate (*Bell*) found the defendant guilty and sentenced him to pay a fine of Rs. 10, and in default to suffer fourteen days' imprisonment with hard labour.

In appeal, per CAYLEY, J.—" Affirmed, but amended by striking off that part of the sentence which imposes imprisonment for 14 days in default of the fine being paid. The sub-section of the Ordinance 11 of 1865, on which the charge is brought, has

been repealed by the Ordinance 7 of 1873; but an offence at common law has been proved, and we see no reason to interfere with the finding. No power is given to a Police Magistrate, by the Ordinance 11 1868, to impose imprisonment as part of his sentence in default of the fine being paid; though such imprisonment will follow, in the event of the amount not being recovered under the warrant of distress." Drunk and disorderly.

November 24.

Present MORGAN, C. J., STEWART and CAYLEY, J. J.

P. C. Colombo, 16953. On the information of T. Harrison, Inspector of Police, six women were charged with being common prostitutes, under the Contagious Diseases Ordinance. After a long investigation, the Magistrate (*Conolly*) acquitted the 5th and 6th defendants, expressing his belief that as regards them the case was false. He added in his judgment—"the conduct of the Inspector who lodged the information is open to grave censure. Had he made proper enquiries and ascertained the character of his witnesses, these women would not have been charged." The complainant was thereupon ordered to pay the expenses of the two accused, including the Proctor's fees. The case against the other defendants was postponed. Contagious diseases Ordinance.

In appeal, per MORGAN, C. J.—"Affirmed as respects the acquittal of the 5th and 6th defendants, but set aside as respects the order condemning the Inspector to pay the expenses of the 5th and 6th defendants. The Supreme Court quite concurs in the opinion expressed by the Police Magistrate, that it was the duty of the Inspector to make proper enquiries, and to ascertain the character of the witnesses before he preferred the charge against the two women. Want of time is no excuse for the non-performance of this necessary duty. It sets aside the fine in this instance, simply because it appears that the Inspector received his information from the Police Serjeant and acted bona fide in preferring the charge."

P. C. Kurunegala, 24685. The defendants in this case were charged with having escaped from the custody of the Police, in breach of Ordinance 11 of 1868, clause 170. It appeared at the trial that the defendants had been arrested, without a warrant, by the complainant for gambling, and had escaped after the arrest. They had been acquitted, however, of the charge of gambling, and, in answer to the charge of escape, pleaded justification, in that the arrest had not been lawful. Escape.

Escape. The Police Magistrate (*Ellis*) upheld this view of the case and acquitted the defendants.

In appeal, per STEWART, J.—" Affirmed. The offence which the accused was supposed to have committed, viz. gaming in breach of the 4th sub-section of 4th section of Ordinance 4 of 1841, is not comprised in the 52nd and 53rd sections of Ordinance 16 of 1865, which set out the offences where a constable may arrest without a warrant. The 7th section of Ordinance 4 of 1841, it will be seen, draws a distinction between the arrest by a constable or headman of idle and disorderly persons, rogues and vagabonds, and persons accused of robbery, etc. In the former class of cases, to render the arrest lawful the persons apprehended must be of the description stated : whereas in the latter and graver class of crime accusation is sufficient."

November 27.

Present MORGAN C. J., STEWART and CAYLEY, J. J.

Forcible entry. *P. C. Kandy*, 99714. The defendants in this case were charged with forcibly entering on the complainant's land and picking coffee. From the evidence it appeared that defendants had come into the complainant's garden, while he was temporarily absent, and had picked coffee from the trees. On complainant returning, he was driven away by the defendants who threatened him and ran after him. The Magistrate (*Pole*) acquitted the defendants on the ground that they were in possession when the complainant went to the land, and that defendants did not enter " forcibly" but "cunningly."

In appeal, (*Grenier* for appellant,) per STEWART, J.—" Set aside and remanded for hearing. Force on the part of the accused is no doubt essential to constitute an offence under the Proclamation. But if the entry was made in the short interval of the casual absence of the occupant, and force used to prevent his returning to his premises and continuing his occupation, the circumstance of the defendant having 'cunningly' got on the ground before the complainant and during his temporary absence will not alter the aspect of the case. See Russell on Crimes, vol. 1., page 426. ; I Hawkin's, vol. I, page 301."

Postal Ordinance. *P. C. Ratnapura*, 14972. The plaint disclosed that, in breach of clause 48 of Ordinance 27 of 1865, the defendant, (a tappal-runner) had not used proper care and diligence in conveying certain postal packets which had been entrusted to him. The only evidence adduced for the prosecution to prove the alleged carelessness and misconduct was that the mail-bag had not

been delivered. The accused pleaded that he had been assaulted and robbed, but it transpired in evidence that the only witness who had gone to the spot where the assault was said to have taken place saw no traces of a struggle on the ground or any indications of violence having been used. The Magistrate (*Neville*) acquitted the defendant, on the ground that there was no evidence against him, and ordered that his expenses be paid by complainant. Postal Ordinance.

In appeal, per Stewart, J.—" Judgment affirmed, with the exception of that part which orders the expenses of the defendant to be paid."

December 1.

Present Morgan, C. J. and Stewart, J.

P. C. Negombo, 31450. The plaint charged the defendant, under clause 165 of Ordinance 11 of 1868, with having obstructed the complainant (a police constable) in the execution of his duty, when attempting to enforce a criminal warrant against one Podda. It appeared from the evidence that two persons had, without an affidavit, obtained a warrant from the Justice of the Peace of Negombo at his private residence, to arrest a convicted thief who was lurking in the neighbourhood, and that the complainant had been entrusted with its execution. The Police Magistrate (*Liesching*) held the charge proved and the defendant guilty in the following judgment : " the 232nd clause of Ordinance 11 of 1868, under which he (the Justice of the Peace) acted, is silent as to how the Justice of the Peace is to satisfy himself that a person is lurking within his jurisdiction who cannot give a satisfactory account of himself. All the clause sets forth is that if it shall '*appear*' to the Justice of the Peace that such is the case. In the present instance, the Justice of the Peace was as satisfied of the truth of the verbal statements of the two witnesses as if they had been sworn to, and granted the warrant. Whether such warrant was issued regularly or irregularly, the Court holds that the defendants must be held guilty of having resisted the complainant in the lawful execution of his duty. Defendants are severally adjudged guilty and sentenced to 3 months' imprisonment each at hard labor." Resisting the Police.

In appeal, " Affirmed."

P. C. Kandy, 98697. The Proctor who had filed the appeal in this case was noticed to show cause why he should not be punished for Contempt, " in that he filed a petition containing Contempt, Petitions of Appeal.

Contempt. Petitions of Appeal.

false statements, and in that he took no precaution to ascertain in the first instance from the Proctor who appeared for the defendant at the trial whether those statements were true or false." The explanation offered having been accepted by the Supreme Court as "very satisfactory," the Chief Justice proceeded to record the following minute. "The Supreme Court takes this opportunity to express its opinion, on the practice, which seems to prevail in some stations, of Proctors interfering in cases and advising appeals, relying simply on the statements made by the parties, without taking due precaution to satisfy themselves that those statements are true. Such a practice ought to be checked. Proctors acting in this manner will be regarded as acting in contempt of this Court, to which the appeals are addressed. A respectable Proctor ought not to advise an appeal on the facts of which he has no personal knowledge, without taking every reasonable precaution to satisfy himself that the statements made by the party consulting him are true. Further, such a Proctor should always append his name to appeals which he advises, and should not seek to make a profit by his office without openly sharing the responsibility which justly attaches to it."

Malicious Injuries Ordinance.

P. C. Colombo, 14797. This was an appeal on the following judgment of the Magistrate (*Conolly*), acquitting the defendant on a charge laid under the 19th clause of the Malicious Injuries Ordinance. "I believe that the defendant threw dirt into one of the tubs in question on the occasion complained of, but I further believe that the defendant did this under the impression that the tubs belonged to her husband, and from the civil action it is not clear which side had the actual possession of the tubs. The evidence being conflicting, and under the circumstances, I doubt if defendant is liable to punishment. I give the defendant the benefit of such doubt and acquit her. If an appeal be taken and the Supreme Court decide that defendant is liable, there will be no necessity for sending back the case for rehearing, as the facts are ascertained."

In appeal, per Morgan, C. J.—"Set aside, and the defendant declared guilty and sentenced to pay a fine of five rupees. The act complained of was clearly damage to personal property under section 19 of the Malicious Injuries Ordinance, No. 6 of 1846. The evidence on the part of the complainant (no witnesses were called on the part of the defendant) shews that the tubs were in possession of the complainant at the time the damage was done;

and the filthy nature of the act imputed to the defendant, rebuts the presumption that she was acting only in assertion of her right to the tubs."

Malicious Injuries Ordinance.

Gambling.

P. C. Matale, 8224. The defendants were charged with "gaming and betting with a bone," in a garden near the road to Gurapola Estate. The Magistrate (*Penny*) held as follows:—"It seems to me that the promiscuous meeting of Moors, Tamils and Singhalese in a place open to the public gaze, and their gambling by means of a game of chance at that place, would amount to 'using a place for common and promiscuous gambling.' If this be not a case contemplated by the Ordinance, then men can collect and gamble in front of the Court-house, Police-station, or on the public road, so long as they change the site of their operations each time. This I never can believe was intended by the Ordinance and yet the parallels are complete:—accused are convicted and fined Rs 20 each, (½ to complainant.")

In appeal, the conviction was set aside; and per MORGAN, C. J.—"For any thing that appears to the contrary, the garden where the defendants were found gambling may never have been used for such a purpose before. The Ordinance, it will be seen, draws a distinction between gaming in a road or open and public place and private premises. The gambling in the present case not having taken place in any road or open and public place, there should have been some evidence that the place was kept or used for the purpose of common or promiscuous gambling."

Arrack Ordinance.

P. C. Balapitimodera, 45678. Two defendants were charged, under the 26th clause of Ordinance 10 of 1844, with having sold arrack, on the 30th July, in a garden called Hettigewatte, without a license. Having pleaded guilty they were fined Rs 50, half of which sum was awarded to the complainant. From the petition of appeal, it appeared that the defendants had duly obtained a license to sell in an adjoining garden called Galleboddewatte, but the owner thereof having violated an agreement to allow the accused to occupy the land, they had been obliged to sell at Hettigewatte; also that the defendants had promptly represented the matter to the Government Agent who subsequently licensed the new place.

In appeal, per MORGAN, C. J.—"Affirmed. The charge brought against the defendants falls within the letter of the law;

Arrack Ordinance.

and they having pleaded guilty, the Magistrate felt bound to impose a fine of Rs 50. But the Magistrate is recommended not to enforce payment of the fine, until the defendants shall have had an opportunity to apply to the Governor for remission."

December 11.

Present Morgan, C. J. and Stewart, J.

Salt Ordinance.

P. C. Kalpitiya, 4533. The plaint in this case was—

"that the defendants did, on the 27th day of June, 1874, at Vellenkara, possess a quantity of about 15 bushels of naturally formed Salt, which they were unable satisfactorily to account for, in breach of the 7th clause of the Ordinance No. 3 of 1836."

The Magistrate (*Smart*) convicted the first two and acquitted the third and fourth defendants in the following judgment: "The 7th clause of the Ordinance 3 of 1836 provides that the occupier of any house or premises, in which shall be found salt which he is unable satisfactorily to account for, shall be liable to punishment. I believe that it is absolutely necessary, before any conviction could be obtained under this clause, that there should be some evidence, either direct or circumstantial, to convict the defendant with knowledge of his possession; in other words, there must be proof of scienter, or else a conviction would often be manifestly unjust. In this case there is no direct evidence, but the circumstantial evidence is very strong, I think. A large quantity of salt, some 15 bushels, is found in a garden leased by 1st and 2nd defendants, and it has, in the opinion of the witnesses and according to Alli Tambi's, statement, been there for many months. How is it possible that the occupiers of the premises, who of course must have often visited the garden, could be in ignorance of the existence of the salt? It seems that a fire of some kind had been lit over the spot, and this is another reason for supposing that the salt must have been deliberately hidden. All these reasonable suspicions, which are met by no rebutting evidence on the defendants' part, exclude almost every possibility save the guilt of defendants. The 3rd and 4th defendants, being not properly the occupiers, are found not guilty, but 1st and 2nd are found guilty. The salt has been duly measured out and is found to be 15 bushels. The defendants are fined Rs 5 per bushel, each defendant fined 75 Rs. 20 Rs. informer's share to be paid to complainant; 10 Rs to Alli Tambi. Salt to be confiscated."

In appeal, per Morgan, C. J.—"Set aside and first and second defendants found not guilty. In the absence of an in-

terpretation clause defining the word "occupier", it must be held to mean a person in the actual de facto occupation of certain premises. According to the evidence, the defendants' residence was some two or three miles away from the garden in which the salt was found, and there is no evidence to shew that the defendants buried the salt in the place where it was found." Salt Ordinance.

P. C. Negombo, 30696. This was a charge against two headmen, under clause 22 of Ordinance 4 of 1867, of having "wilfully neglected to do their duty, as Fiscal's officers, by not seizing the property pointed out to them by the complainant for seizure under writ No. 6718, D. C. Negombo, which was directed to them by the Deputy Fiscal for execution." Fiscal's Ordinance.

The evidence disclosed that on the defendants' preceeding to the debtor's house, a third party, laying claim to the property pointed out, locked the door of the house and went away with the key; that thereupon complainant asked the defendants to break open the house and seize the goods on his responsibility, which they refused to do; complainant also stated that defendants were authorised in writing by the Fiscal to act as his officers in the execution of the writ.

The Magistrate (*Liesching*) dismissed the charge in the following terms: "The evidence of the complainant does not go to shew any such wilful neglect of duty on the part of defendants as would, as Fiscal's officers, render them penally liable. Section 4 of clause 30 of the Fiscal's Ordinance says, doors *may* be broken into, not *shall*; a Fiscal's officer is therefore entrusted with a discretionary power."

In appeal, per MORGAN, C. J.—"Affirmed. The Supreme Court concurs with the Magistrate in thinking that the case is one in which the defendants might properly have exercised their own discretion."

P. C. Batticaloa, 7765. The plaint charged the defendant with "having in the District Court of Batticaloa wilfully given false information on oath to the Justice of the Peace of the said district, with intent to support a false accusation against the complainant, whom the defendants charged with robbery and assault on his son, in breach of the 166th clause of Ordinance 11 of 1868." False information.

False information.

In appeal, against a conviction by the Magistrate, (*Worthington*), the judgment was set aside and the defendant acquitted; and per Morgan, C. J.—" The particular information alleged to be false is not set out in the plaint, which seems to refer to the entire charge preferred by defendant against the complainant. Where such is the case, an indictment for perjury is the proper remedy."

December 22.

Present Morgan, C. J. and Stewart, J.

Drawing toddy.

P. C. Kurunegala, 24245. This was a charge of drawing toddy without a license, in breach of clause 36 of Ordinance 10 of 1844. The Magistrate (*Ellis*) entered a verdict of not-guilty, holding that the mere fact of the toddy having been drawn from defendant's tree was insufficient to justify a conviction, and that the evidence failed to establish that the accused drew or caused to be drawn the toddy in question, or that he was in possession thereof.

In appeal, per Stewart, J.—" Set aside and defendant fined Rs. 10. The toddy was seized on a tree in the garden of the defendant, where he was residing. His casual absence from home at the moment of seizure cannot make him less accountable. Having regard to the time, extending over some days, necessarily taken in the preparation of the cocoanut flower and the nature of the toddy drawing process, it is incumbent on the defendant, the owner of the tree, to give exculpatory evidence, in the absence of which it is but reasonable to conclude that he either drew or caused the toddy to be drawn."

Receiving stolen property. Defective plaint.

P. C. Matale, 8265. The plaint charged the defendant with "unlawfully receiving one silver hair pin and 5 silver beads, knowing them to be stolen."

In appeal, against a conviction by the Magistrate (*Penny*), per Stewart, J.—" Set aside. The owner of the goods was not examined, and there is no legal evidence on these proceedings that the things were stolen. The plaint also is bad, in that it does not allege to whom the things belonged."

Gambling.

P. C. Kandy, 100268. The defendants were charged with gaming at a house kept for the purpose of common and promiscuous gaming, in breach of Ordinance 4 of 1841. It was proved that the house in question was one where people habitually

Gambling.

gambled and was specially kept for that purpose by the 1st defendant; but the Magistrate (*Pole*) declined to convict, on the ground that a private residence, not used as a tavern or shop, would not fall within the Ordinance, in the sense of being kept or used for the purpose of common and promiscuous gaming.

In appeal, per MORGAN, C. J.—"Set aside and case sent back for the Magistrate to hear evidence and give judgment *de novo*. The Ordinance makes it an offence for a person to gamble in any *place* kept or used for the purpose of common or promiscuous gaming. There is evidence to shew that the house in question, (which has been held to fall under the description 'place') was kept or used for such purpose."

Attempting to rescue prisoners.

P. C. Kurunegala, 25034. The defendants were charged with having attempted to aid in the escape of certain prisoners who were in the lawful custody of the complainant as a Fiscal's peon, in breach of clause 170 of Ordinance 11 of 1868, and also with assaulting and beating the complainant. The accused were found guilty by the Magistrate (*Ellis*) and sentenced to three months' imprisonment and 15 lashes each.

In appeal, per STEWART, J.—"Affirmed as to the sentence of the imprisonment with hard labour, set aside as to the lashes. Though an assault is included in the latter part of the plaint, the charge is expressly laid under the 170th section of Ordinance 11 of 1868, which, for a rescue or assistance given in an attempt to escape, does not authorise the imposition of a sentence beyond fine or imprisonment with or without hard labor. There is no evidence that the 2nd defendant committed any assault: that committed by the first defendant was trivial, and committed in furtherance of the attempt to rescue."

Irregular sentence.

P. C. Matale, 8091. This was a charge of assault and false imprisonment of the complainant for three days. The Magistrate (*Penny*) acquitted the defendant, disbelieving *in toto* the complainant's story, and ordered her to pay the accused Rs. 6 as expenses; and called upon her to shew cause why she should not be punished for bringing a false case. Upon her saying "accused has got witnesses and I have witnesses," the Magistrate recorded her words, with the following remark: "She makes no application for time to show cause." He thereupon fined

Irregular sentence.

her Rs. 10, and further called upon her to shew cause the next day why she should not be punished for contempt "in misleading the Court by stating that she did not say she was not absent on one occasion when the case was called from a desire to settle the case." On her shewing no cause, she was sentenced to 7 days' imprisonment.

In appeal, by the complainant, per MORGAN, C.J—"Affirmed as to the acquittal of the accused, but the order condemning the complainant to pay the expenses of accused, and to pay a fine of Rs. 10, and to be imprisoned for a week, set aside. If the Court meant to take such penal measures against the complainant, her witnesses ought to have been heard in the first instance. The detention of the woman is partially admitted by the accused, who stated that he took her because 'she would go with him.'"

Evidence. Re-hearing.

P. C. Mallakam, 3315. Two defendants were charged with having assaulted the complainant on the 22nd October. The first accused having succeeded in proving an alibi, by calling the attesting witnesses to a deed which purported to have been executed on the same day at a village some miles distant from the alleged scene of the assault, the Magistrate (*Livera*) recorded a verdict of not guilty in the following terms:

"As the case against the 1st accused is proved to be absolutely false, I cannot rely on the evidence against the 2nd. Both are acquitted and discharged."

In appeal, (*Ferdinands* for appellant, *Grenier* for respondent) per MORGAN, C. J.—

"Set aside and case sent back for further evidence. It was alleged on behalf of the appellant that she has evidence, to disprove the alibi relied upon by the defendant, which she, having been taken by surprise, was not prepared to adduce at the trial. The Counsel for the respondent does not require an affidavit in support of the allegation, but contends that the finding, being one on the facts, cannot be interfered with. The Supreme Court will not by its present order alter the Magistrate's finding on the facts, though it does not concur with him in such finding, but sees no objection to let in new evidence in further elucidation of the case."

THE APPEAL REPORTS.

1874.

PART II.—COURTS OF REQUESTS.

February 10.

Present Creasy, C. J., Stewart and Cayley, J. J.

C. R. Gampola, 28590. The plaintiff instituted this action in February, 1873, to recover a sum of Rs. 39 due on a debt bond dated 27th May, 1870. The bond was admitted, but payment was pleaded in defence. After repeated postponements, which were chiefly due to the defendant, the case was taken up on the 7th October, when he moved to be allowed further time to prove that plaintiff was an insolvent and as such had no right to sue. The case was thereupon postponed for the 13th October, on condition that defendant should forthwith deposit in Court the amount claimed in the libel. The defendant subsequently succeeded in establishing the alleged insolvency, but having neglected to make the deposit ordered, the Commissioner *(Nevill)*, after duly calling upon him to shew cause, punished him for contempt by imposing a fine of Rs. 10. Contempt.

In appeal, per Creasy, C. J.—" Set aside. The Court of Requests might, under Ordinance 9 of 1859, have attached the defendant until he obeyed the order by paying the money, but it had no authority to treat this non-payment as a contempt."

C. R. Gampola, 29129. In this case the plaintiff sued for payment for use and occupation of a house for a period longer than a month. The Commissioner (*Nevill*), on ascertaining there had been no notarial lease according to the Ordinance of Frauds, No. 7 of 1840, summarily entered a judgment of non-suit. Use and Occupation.

In appeal, per Creasy, J.—"Set aside and case sent back for rehearing. This nonsuit was erroneous. The Supreme Court has repeatedly pointed out that, though a contract may be defective under the Ordinance of Frauds so that a party cannot enforce it, yet if a party accepts benefit under that originally invalid contract

Use and Occupation.

at another's expense, the party so benefited may, if he repudiates the original contract, be compelled to make compensation for that benefit, either by restitution or by payment of damages as the case may be. Under such circumstances the plaintiff's right of action is based not on the original objectionable consensual contract, but on a new satisfaction of *quasi* contract which is created *ex re.* A recent decision to this effect will be found in C. R. Batticaloa, Grenier's Reports of Court of Requests Cases for 1873, page 16, and the law on the subject as illustrated by English cases was fully explained in C. R. Caltura, 17112, reported in Beven and Mills, August number, 1864, page 13."

Promissory Note.

C. R. Newera Eliya, 3959. The plaintiff as indorsee sued the defendant as maker of a promissory note, of which the following is an exact copy :

" One month after date I the undersigned Engatha Appoohamy of Maturatu promis to paid to Sina Lebbey Odema Lebbey Marikar of Udupussillawa the orders the sum of Rs. 75, seventy five rupees curnssey, velu received in goods."

The defendant pleaded that he was not liable, the plaintiff having undertaken to recover the amount on the note from a third party. The Commissioner (*Hartshorne*) held as follows. " The Court is of opinion that the plaintiff cannot recover the amount claimed on the promissory note filed in this case. The note is merely indorsed by the original payee, who had no right to assign it to the plaintiff without the knowledge or consent of the maker thereof. It does not appear that subsequently to such assignment any new consideration passed in respect of the note, and none of the exceptions which might have made an assignment valid have been proved. It is hardly necessary perhaps to refer to any authorities on the question, but the Court may mention Chitty on Pleading, p. p. 10. 94 and 95; Archbold's Nisi Prius, vol. 1, 297 (2nd edition) ; and in a similar case at Panadure in 1870 a passage was cited to a similar effect. The plaintiff is nonsuited with costs."

In appeal, per CREASY, C. J.—" Set aside and judgment entered for plaintiff for Rs. 55 and costs. The promissory note in the present case is not grammatically drawn, but it was obviously intended to be a note payable to order. For further reasons see judgment of this date in C. R. Newera Eliya, 3958."

Promissory Note.

C. R. Newera Eliya, 3958. This was an action on a promissory note which defendant had executed in favour of one Uduma

Lebbe Maracar, who had indorsed it to plaintiff. The answer was the same as in case No. 3959, the defendant further pleading part payment. The Commissioner (*Hartshorne*) nonsuited the plaintiff on the same grounds as those recited in his judgment in the other suit. Promissory Note.

In appeal, per CREASY, C. J.—" Set aside and judgment entered for plaintiff as prayed, less the amount (i. e. Rs. 20) admitted in case 3959 to have been paid. An indorsement and delivery by the person to whom or to whose order a promissory note is made payable, gives a good right of action. The original maker's approbation of the indorsement is totally unnecessary."

C. R. Matale, 2909. The plaintiff claimed by maternal inheritance one-half of a certain land and alleged that defendants disputed his right. On the returnable day of the summons (25th October) no answer having been filed, the Commissioner (*Penney*) ordered that the case be fixed for *ex parte* hearing on 12th November. The defendants on the 28th October submitted an affidavit to the following effect :— Practice. Judgment opened up.

"That they received summons in the above case and 2nd defendant could not appear on the returnable day as she was ill, but her husband, the 1st defendant, was present and waited as usual until the names of parties were called and they were ordered to file answer. The 1st defendant affirms and states that it was not the custom of this Court to file answer before the returnable day of summons. The defendants further affirm and state that they have a good and valid defence on the merits of the said case."

Their application to be allowed to file answer having been rejected, the defendants appealed.

Per CAYLEY, J.—" Set aside. Upon the affidavit filed, and in view of the nature of the case, the defendants are allowed to file answer, provided they do so within five days of their receiving notice of this judgment. The defendants to pay costs of this appeal and all costs consequent on this default."

February 26.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

C. R. Matara, 18257. The question in this case was whether the *Hoewandiram* due to a native headmen could be seized in execution. The Assistant Government Agent (*Elliott*) having been noticed to shew cause why, in terms of the 44th clause of the Fiscal's Ordinance, he should not pay into Court certain monies due to the defendant, as Hoewandiram, in order to satisfy plaintiff's writ, it was contended on his behalf that the Hoewandiram was in Hoewandiram is a salary.

Hoewandiram is a salary.

the nature of a salary and could only be seized under clause 34 of Ordinance 4 of 1867. The Commissioner (*Swettenham*), however, made the rule absolute in the following terms. "It appears to me that the plaintiff could have proceeded under either clause 40 or clause 44 of Ordinance 4 of 1867. The only difference is that, under clause 40, the public officer, (the Assistant Government Agent in this case) would have had no opportunity of shewing cause, as he has done. It has been contended that this is not a debt due to the defendant. But Mr. Silva does not deny that the money is owing by the Assistant Government Agent to the defendant. Naturally it must be a debt due to him. The attempted analogy between Hoewandiram and a salary is scarcely worth notice. Hoewandiram is payable thrice a year only, varies in amount, and is payable only on the Government officer being satisfied that the recipient has deserved it by attending to the irrigation of the fields. It cannot be contended that payment which is dependent upon a good or bad crop, and which is the value of an ascertained amount of the crop, is a salary. If this be so, the *ande* share of a cultivator is a salary, for it depends on the same conditions and is payable at the same periods as Hoewandiram. Inasmuch as Hoewandiram is always rendered for past services, the argument that it should be inviolable carries no weight. A seizure of a salary has reference to future services and affects a far superior officer. Hence the caution to be observed by clause 34."

In appeal, (*the Queen's Advocate* for appellant) per CREASY C. J.—"Set aside. This money is in the nature of a salary, and is within the protection of clause 34 of the Fiscal's Ordinance. The subject of the immunity, (absolute or conditional), of the pay of public servants, was carefully considered, and very full judgments on the subject were given in C. R. Batticaloa, No. 10551, and in C. R. Galle, No. 29246.* Those judgments are recorded in the Civil Minutes of the Supreme Court for 5th July, 1865. The 34th section of the Fiscal's Ordinance was intended to embody and ordain the most important parts of those judgments. It may be seen from them that the attempt to justify the seizure of salaries, when they have been due, because they are debts, is quite futile. This money is clearly due to the officer in the nature of a salary. There is an essay on the subject of 'Hoewandiram' by Mr. Nell, printed in the Legal Miscellany (No. 14) between p. p. 70 and 77.† Our attention has been drawn to it by the Queen's Advocate in the present case. The authorities cited in that essay have been

* See Appendix. † See Appendix.

verified, and they establish that Hoewandiram is a legal payment, which the Mayoraals are entitled to receive as their due from the land owners for duties performed by them, the Mayoraals, as public officers. As such we consider the Hoewandiram to be conditionally protected from execution, both by common law and under the Fiscal's Ordinance. There is no reason for limiting the word 'salary' as used in the Ordinance any more closely than the word 'salarium' as used in the Roman Dutch Law Books. The Ordinance does not say 'fixed salaries,' but 'salaries' generally, which include all legal and regular remuneration for 'services rendered' by public officers."

Hoewandiram is a salary.

C. R. Colombo, 90949. The plaintiff sought to recover a sum of Rs. 70, as damages consequent on his bullock having been unlawfully cut and wounded by the defendant, who pleaded minority, amongst other matters, in his answer. The Commissioner (*de Livera*) upheld the plea and non-suited the plaintiff.

A Minor cannot be sued without a guardian or curator in a civil action *ex delicto*.

In appeal, Browne, for the appellant, contended that as this was an action *ex delicto* the defendant, although a minor, was rightly sued. *Grotius*, 1, 4, 1.

Per CAYLEY, J.—"Affirmed. A minor cannot appear in answer to a civil action without the intervention of a guardian or curator, and there is no difference in this respect between actions ex contractu and actions ex delicto. Vander Keessel (thes. 127) is very clear on the point. "Pupilli," (he says) "sine tutoribus in judicio tanquam actores aut rei consistere nequeunt, etiam in delictis civilibus." In criminal cases the law is different, for in these the accused, though a minor, must appear personally. Groen. de Legs. Abrogat. Cod. lib. v. tit. 59. The passage in Grotius, (Herbert's tranlation, p. 18) cited in the petition of appeal appears to refer to criminal proceedings. At all events the authority cited from Groenewegen in the note to the above passage in Herbert's Grotius has reference to criminal proceedings only, and is no authority in support of the position that a minor can appear by himself in a civil action ex delicto."

March 3.

Present CREASY C. J., and STEWART, J.

C. R. Kalutara, 32342. The Commissioner (*Power*), having partly heard evidence in the case, made order as follows: "Postponed till Thursday, parties wishing to swear at Kanda Vihara. The Aratchy of the village to be present and report." Subse-

Decisory oath.

Decisory oath.

quently the plaintiff was non-suited with costs, on the ground that the defendant had taken the necessary oath.

In appeal, per STEWART, J.—" Affirmed. The plaintiff was bound by his agreement."

Malicious prosecution.

C. R. Gampola, 29170. The following judgment of the Commissioner (*Nevill*) explains the case : " In this case the plaintiff sues for Rs. 49, being expenses and damages caused by plaintiff having been brought up from Kegalla on J. P. process and defendant's failing to prosecute on the information lodged. The amount is not questioned by defendant who pleads sickness as the reason he did not prosecute. This is not established by evidence, and no ground is before the Court for defendant's failure to prosecute on the information lodged against plaintiff. Of plaintiff's damages, Rs. 12 batta and Rs. 20 damages for loss of business are a fair charge, but no person accused before a Justice of the Peace is bound to engage Counsel to watch for him and plaintiff must bear that himself. Judgment for plaintiff for rupees thirty two and costs of suit."

In appeal, the judgment was set aside and plaintiff nonsuited with costs ; and per STEWART, J.—" This is in effect an action for malicious prosecution, to sustain which it is essential that the plaintiff should give some evidence of the defendant's malice as well as of want of probable cause. There is no proof on either of these points, all that appears being that the defendant failed to prosecute his charge owing, as he alleges, to his illness. An acquittal however for want of prosecution is not even prima facie evidence of malice. See Purcell v. Macnamara, 9 East, 361. The proceedings before the Justice of the Peace ought to have been produced."

Taxed bills. Action to recover amount of—

C. R. Gampola, 29040. The plaintiff sought to recover the amount of four bills on account of batta which had been duly taxed by the Secretary of the Kandy District Court. The Commissioner (*Nevill*) nonsuited him in the following terms : " In this case plaintiff sues on a memo of taxed bills, whereas his action should be based on the taxed bills themselves. The memo is not even worthy of the title of secondary evidence, for it is no evidence at all. The action being based on documents which have special force at law and are not in evidence, plaintiff is nonsuited with costs."

In appeal, per STEWART, J.—" Set aside and remanded for

further hearing. The memorandum referred to in the plaint is only in elucidation of the plaintiff's demand. The action is brought for the amount due on the taxed bills, and the plaintiff should have been allowed to proceed with his proof. Costs to abide result." Taxed bills. Action to recover amount of—

C. R. Kalutara, 33168. The plaintiff sued defendant on an assignment of a bond dated 20th November, 1872, which the latter had executed in March 1869 in favor ot one Aberan Fernando. The defendant pleaded (1) payment to the assignor, (2) want of notice of the assignment, and (3) that he (the defendant) had already instituted a case No. 26121 in the District Court of Kalutara for the recovery of the discharged bond from the said Aberan Fernando, who was alleged to be acting in fraud and collusion with the plaintiff. The Commissioner (*Power*) held as follows: "Plaintiff is non-suited with costs, no notice of assignment having been proved to have been given; and Aberan, at the time of the assignment being sued on this very bond, was not justified in assigning it to a third party, who also it appears was aware of an action between Aberan and defendant." Assignment of a Bond.

In appeal, (*Ferdinands* for appellant, *Grenier* for respondent) per CREASY, C. J.—"Set aside and judgment to be entered for plaintiff. Notice was proved, and we are inclined to think that the bringing of the action was sufficient notice. It made the plaintiff's cause of action complete before the *litis contestatio*."

March 10.

Present CREASY, C. J. and STEWART, J.

C. R. Kalutara, 32519. The plaintiff sued to recover a debt of Rs. 90 with interest from defendant, who pleaded "never indebted." The Commissioner (*Jayetilike*) after hearing some evidence made order as follows: "Referred to the defendant's oath by consent of parties—to swear at 8 to-morrow." The defendant having failed to take his oath, judgment was entered for plaintiff with costs. Decisory oath.

In appeal, per CREASY, C. J.—"Set aside and case sent back for regular trial."

C. R. Matale, 30207. The plaintiff instituted this action on the 1st October, 1873, to recover the sum of Rs. 95, "being balance wages due for serving under the defendant as a clerk from 28th December, 1870, to 21st July, 1872." The defendant denied being Clerk's wages. Prescription.

Clerk's wages. Prescription. indebted and pleaded prescription. The plaintiff, being examined, stated

"I was employed by defendant as a clerk in his boutique where we sold rice, cocoanuts, salt &c. I did not sell goods. I kept accounts only. Defendant kept 4 or 5 others to sell in the boutique. Defendant lived in the boutique, so did I. When he ordered me I used to go and inspect his gardens and also sell when he asked me. I was employed as defendant's servant and got Rs. 15 a month. One day he told me that I could stay or go as I liked, so I went. He did not pay me regularly, he gave me money when I asked him. I lived in the boutique all day and night. I used to help defendant then in selling things, we made no agreement as to *notice* to be given before leaving."

The Commissioner (*Penney*), without hearing any evidence, entered a judgment of non-suit in the following terms: "Plaintiff was evidently employed as a domestic servant in defendant's boutique which was also defendant's residence."

In appeal, (*Grenier* for appellant) per STEWART, J.—"Set aside and remanded for further hearing. Costs to stand over. The plaintiff should be allowed the opportunity of proving his employment under complainant as a clerk. If he was employed as a clerk, the 9th section of Ordinance 22 of 1871 will not apply."

May 12.

Present CAYLEY, J.

Practice. Dismissal. *C. R. Kalpitiya*, 27187. Held, *in appeal*, that the Court below having once dismissed plaintiff's case had no power to re-open it. All proceedings subsequent to the dismissal were declared null and void.

Self-constituted trust. *C. R. Colombo*, 95054. In this case the defendant had entered into a notarial agreement, subsequently to the death of his wife, with the plaintiff, his father-in-law, undertaking to secure to his (the defendant's) minor child one-half of a certain house in Andiwal Street, as its deceased parent's share of the common estate. The plaintiff, who described himself in the libel as "guardian over the minor child Manuel Gomes," now sued the defendant for the recovery of Rs 95.50, "being half share of house rent due, upon the agreement dated December 1871, to plaintiff, as guardian as aforesaid, from September 1872 to October 1873." The answer raised the plea that the plaintiff had no right to sue as guardian in the absence of any judicial appointment, the natural guardian of the child being the defendant. The Commissioner (*Livera*) upheld the objection and non-suited plaintiff with costs.

In appeal, (*Ferdinands* for appellant) per CAYLEY, J.—"Affirm-

ed. The plaintiff has not been legally appointed guardian of the minor; and this Court will certainly not uphold any arrangement, dealing with the minor's property, which is prejudicial to the minor, and entered into without the sanction of a competent Court. The conduct of the plaintiff, a self-constituted trustee, in trading with the minor's property, amounts to a gross breach of trust for which he ought to be called to account." Self-constituted trust.

May 15.

Present CAYLEY, J.

C. R. Matara, 28123. The plaintiff sought to recover Rs. 30, being the value of a cow which had died from the effects of injuries received at the hands of the defendants while trespassing in their garden. The Magistrate (*Jumeaux*), after hearing evidence on both sides, nonsuited the plaintiff in the following terms: "Admitting that plaintiff's story is true and that 1st defendant did strike the cow and that its leg was broken, I do not consider that plaintiff is entitled to recover its value; the fracture of a leg would not, if the animal was properly taken care of and looked after, kill it. But for the sake of argument, admitting that 1st defendant was the cause of its death, the plaintiff cannot recover its value from defendants. They have an enclosure which is admitted to be well-fenced all round. Plaintiff allows his animal to wander about without any check, and the animal breaks through the fence and trespasses. Defendants naturally annoyed beats the animal and it is injured, but it is still plaintiff's own fault, because he has allowed his animal to trespass. Plaintiff must therefore suffer for it. I do not think, therefore, that even if the case were proved satisfactorily, that defendants would be liable to pay more than nominal damages and costs of suit. The contradictions in the case are very suspicious, and I cannot on *such evidence* give plaintiff a judgment even for nominal damages." Action *ex delicto*. Damages.

In appeal, per CAYLEY, J.—"Affirmed. The evidence is conflicting, and no sufficient reason has been disclosed for setting aside the finding of the learned Commissioner on the facts of the case. If, however, the evidence given by the plaintiff and his witnesses had been worthy of credit, the Supreme Court does not agree with the Commissioner that the plaintiff would be entitled to nominal damages only. The fact that the defendant's garden was properly fenced would not justify them in breaking the cow's leg because it was trespassing, when it could have been driven away without inflicting any such injury; and if the defendants had been

Action *ex delicto.* Damages.

proved to have acted with unnecessary violence and cruelty, substantial damages should have been given. On the other hand, if plaintiff had purposely allowed the animal to wander about where it pleased in order that it might feed on other people's lands, such misconduct by the plaintiff might properly have been taken into consideration as a ground for the reduction of damages; and it is always open to defendants in cases of this kind to set up a claim in reconvention for the injury sustained by them, either in consequence of the harm actually done to their property, or in consequence of the violation of their proprietary rights. The law to be applied, and the circumstances to be taken into consideration in dealing with cases of this kind, are fully set out in the judgment of this Court in case No. 7976, C. R. Kurunegala, Supreme Court Minutes, 1863."*

Implied contract. Jurisdiction.

C. R. Colombo, 94265. The plaintiffs (*Keppel Jones and Co.*) sued the defendant (*Laurence*) for the recovery of Rs. 20, "being rent of a garden situated at Mattacooly, belonging to the plaintiffs, and used by the defendant, with plaintiffs' permission, for the storage of 98 tons of ebony during the months of July and August last, at the rate of Rs. 10 per mensem." The defendant pleaded "never indebted" and that no ebony belonging to him had been ever deposited in plaintiffs' premises. The Commissioner (*Livera*) held as follows: "The correspondence filed shews that an offer on the part of the defendant to purchase the timber was accepted, but when defendant was called upon to take charge of his purchase, he postponed doing so till he got a vessel to ship the same in, but at the same time he requested the plaintiff not to refuse a higher offer should in the meantime one be made. The instructions plaintiffs received from their principal being explicit, the plaintiffs wrote to defendant that he must consider the timber as belonging to defendant and that defendant would be liable for expenses. The present action is founded on that notice. As the defendant denies he is the owner of the timber and the value of the timber exceeds £10, the question is not within the jurisdiction of the Court. The plaintiff is nonsuited and the parties are referred to the District Court."

In appeal, per Cayley, J.—"Set aside and judgment entered for plaintiffs as prayed for with costs. The substantial issue in this case is whether or not there was any promise, express or implied, that the defendant should pay for the storage of the timber. In determining this question, it is no doubt important to ascertain

* See Appendix.

Implied contract. Jurisdiction.

whether the timber belonged to the defendant while it was stored in plaintiffs' premises or to a third party; but this is a collateral issue only and not even necessarily decisive of the case; so that the mere fact that the value of the timber exceeds ten pounds (Rs. 100) will not oust the jurisdiction of the Court of Requests. Neither party has thought it worth while to instruct Counsel to appear at the hearing of the appeal, and it is possible that, in the absence of any assistance from the Bar, I may have overlooked some considerations to which weight should have been attached. It appears to me, however, that the correspondence and conduct of the parties with reference to the transactions in question were of such a character as to raise an implied contract on the part of the defendant to pay to plaintiffs a reasonable sum for the storage of the timber, until defendant removed it from plaintiffs' premises, and the sum claimed appears to this Court to be reasonable."

Work and labor done.

C. R. Gampola, 28992. The plaintiff (*Franke*) sued the defendants (*Messrs. Reid* and *Mitchell*) to recover Rs. 60, being wages due to him for work and labor done in the capacity of a foreman during the month of June, 1873. The defendants in their answer denied the claim, and pleaded that the plaintiff had left their service without reasonable cause and without due notice, and that in consequence of his neglect of duty they had suffered damage to the amount of Rs. 100, which they claimed in reconvention. It appeared that the plaintiff had given notice on the 2nd of June which had been conditionally accepted by his employers, and that he had in point of fact continued to work till the end of that month. The Commissioner (*Bell*) dismissed plaintiff's claim and gave judgment for defendants for Rs. 100 and costs of suit.

In appeal, (*Grenier* for appellant, *Ferdinands* for respondents) per CAYLEY, J.—"Affirmed, but amended by reducing the judgment in reconvention in defendants' favor from Rs. 100 to Rs. 40. The notice given by plaintiff on the 2nd June was accepted by the defendants, and, according to the evidence of D. Mackenzie, plaintiff continued to be defendants' foreman until the end of June, and he is therefore entitled to his wages for that month. Each party will pay his own costs in both Courts."

Lease under a power of attorney.

C. K. Gampola, 29222. The plaintiff sued to recover Rs. 30, for the use and occupation by the defendant of plaintiff's house No. 12, Kandy Street, Gampola, from 1st to 30th September, 1873. The defendant pleaded that he was, under a notarial lease, the

Lease under a power of attorney.

tenant of plaintiff's husband, Don Singoappoohamy, who held a power of attorney from the plaintiff authorizing him to lease all her immoveable property. The lease had been executed for a term of four years on the 18th of November, 1872, when defendant had advanced two years' rent to his lessor, who at the trial admitted the receipt of the money and that he had paid a part of it to the plaintiff herself. The power of attorney, which the plaintiff had given her husband and which was dated 16th October, 1869, after requiring him to arrange for the upkeep and management of all her houses and lands, to carry on all pending law suits, appoint Advocates and Proctors, went on to provide as follows:

"That the said Don Singoappoohamy shall, during my pleasure, keep up and improve the said property, all the moveable and immoveable property, belonging both to me and to the Estate as aforesaid, and shall from the income arising therefrom and from the monies that shall be received from the said cases, improve the said lands and houses and shall also spend them for the law suits; and if there be any lack of money for other expenses, by virtue of this deed, it is appointed, he shall mortgage any property whatever belonging to me and raise money, or if out of the income that may arise therefrom, if there be any thing remaining after spending as aforesaid, all such balance shall be delivered over to me.

"It is appointed, that all the aforesaid conditions, as well as other acts and deeds which shall be required by law and not stated herein, the said Don Singoappoohamy shall perform and execute as if I myself was present and did the same."

The Commissioner (*Bell*) held that the power of attorney did not authorize the lease and gave judgment for plaintiff with costs.

In appeal, (the *Queen's Advocate* for appellant, *Grenier* for respondent,) per CAYLEY, J.—"Set aside and judgment entered for defendant with costs. The Court agrees with the learned Commissioner that the power of attorney did not expressly authorize the plaintiff's husband to make the lease under which the defendant holds. But it appears that plaintiff had acquiesced in the previous leases made by the husband under this power; and Don Singo in his evidence, which is not rebutted, states that he paid the plaintiff the money received in advance in respect of the lease now in dispute. Under these circumstances, the plaintiff is estopped from denying her attorney's authority and from again claiming the rent which, in point of fact, she has already received."

May 19.

Present CAYLEY, J.

Claim in execution.

C. R. Colombo, 93746. The plaintiff complained in this suit that the defendant, who was the holder of a Court of Requests writ,

Claim in execution. Fraud.

No. 76129, had caused the Fiscal to seize and sell certain lands which he, the plaintiff, had purchased from the execution debtor. It was established by the examination of plaintiff that the bill of sale in his favor had been executed on the 2nd December, 1870, being the returnable day of the summons in 76129, part of the consideration recited in the transfer being the amount of a previous mortgage, in January 1870, to plaintiff, which mortgage, however, had not been registered. The Commissioner, (*Livera*) held as follows: "It seems clear that the lands were sold for valuable consideration. The returnable day of the summons in C. R. 76129 corresponding with the date of the bill of sale is suspicious, but hardly sufficient to warrant my holding that the transfer was fraudulent. Judgment for plaintiff as claimed with costs."

In appeal, (*Grenier* for appellant) per CAYLEY, J.—"Set aside and case sent back for further hearing. The burden of proving fraud is no doubt thrown upon the defendant, but the circumstances connected with the transfer to plaintiff are so fraught with suspicion that a sufficiently *prima facie* case of fraud is made out to render it incumbent upon the plaintiff to show the *bona fides* of the transaction. He ought to shew that his mortgage was a good bona-fide subsisting mortgage at the date of the transfer, that the amount due on it was not grossly inadequate when compared with the value of the lands transferred, and that it has been really discharged. The fact of its non-registration is a circumstance of suspicion, which he should explain. He should also summon the mortgagor to produce the original deed, and to explain the true nature of the transaction."

Agreement to cancel a lease.

C. R. Colombo, 94911. The defendant had been the lessee of a land belonging to an estate of which the plaintiff was the administrator. On the 19th of July, 1873, the parties mutually rescinded the lease and discharged each other from all liabilities in respect thereof, save and except as to the right of the lessor to recover certain arrears of rent for which the lessee had already been put in Court. The reservation was expressed as follows in the agreement:

"The deed of revocation shall have no interest over and impede the cases that are now pending between the said parties in regard to the said rent."

On the 30th of October, the present action was instituted to recover rent from 1st to 19th July, 1873. The defendant pleaded the agreement in bar of plaintiff's claim. The Commissioner (*Livera*) however entered judgment against defendant, on the ground that the agreement did not estop plaintiff from recovering.

Agreement to cancel a lease.

In appeal, (*Grenier* for appellant, *Ramenathen* for respondent) per Cayley J.—" Set aside and judgment entered for defendant with costs. The deed of agreement does not, as stated by the learned Commissioner, refer to all claims that may arise after the 19th July, but to all actions that were then pending for the present rent, as far as appears by these proceedings; and this Court thinks that the general intention of the deed of agreement was that all other claims in respect of the lease should be relinquished."

Ex-parte trial.

C. R. Ratnapura, 8642. This was an action for money lent. The defendants pleaded that they were not indebted. After several postponements, the case came on for trial on the 22nd January, 1874, when the following order was recorded by the Commissioner (*Nevill*) :—" Plaintiff present and ready. Mr. Vandenberg for plaintiff. Defendants absent. Mr. Oorloff for defendants present. Notice reported served. This is the second service and they are absent. Defendants must be treated as in default and case decided ex parte. Judgment for plaintiff as claimed with costs."

In appeal (*Grenier* for appellant, *Layard* for respondent) per Cayley, J.—" Set aside and case sent back for hearing. This is not a case of default. Defendant, though absent, appeared by a Proctor, and by the 85th clause of the Ordinance 11 of 1868 parties are expressly authorised to appear in Courts of Requests by duly constituted Proctors. The onus of proof was on plaintiff, and he should have proved his claim before judgment was given in his favor."

Damages for an assault. Proctor's fees.

C. R. Colombo, $\frac{95337}{94142}$. The plaintiff complained that, in consequence of an assault committed on her by the defendant, she had lost a silver chain and a bunch of keys of the value of Rs. 70, and had incurred costs to the amount of Rs. 25, both in prosecuting the defendant and in defending a counter charge of assault preferred by him in the Police Court. The alleged assault and loss were both denied in the answer, which further raised the plea that plaintiff, as a married woman, could not maintain the action. After a careful investigation, the Commissioner (*Livera*) held as follows :- " The defendant's witnesses have not made a favorable impression on my mind. The loss of the keys, while the plaintiff was being assaulted, is not improbable and is established as well as it possibly can be. Judgment for plaintiff for Rs. 70, being Rs. 60 for the charms and Rs. 10 for Mr. Prins' services and costs."

In appeal, Ferdinands, for appellant. The Proctor's fees could not be recovered by a separate action, but should have been awarded by the Magistrate, if he felt justified in doing so, in the Police Court cases. Such costs could not be included in damages claimed for the assault in question. Damages for an assault. Proctor's fees.

Grenier, for respondent. Plaintiff, having been put to this expense by the defendant's wrongful act, might recover the amount as part of the consequential damages she was fairly entitled to.

Per CAYLEY J.—" Affirmed, but amount of judgment reduced to sixty rupees (Rs. 60.) The Proctor's costs in the connected cases cannot be considered as damages arising from this assault. Each party will pay his own costs in appeal."

May 22.

Present CAYLEY, J.

C. R. Galle, 47498. This was an action on a promissory note payable on demand and which contained the following stipulation: " in default of payment, the amount shall be recovered by course of law, the maker paying the same with usual interest from this day." The defendant pleaded prescription and that the note was insufficiently stamped. The Commissioner (*Lee*) held as follows : " The promissory note is dated 1866, and hence, if it fell due then, it would be now prescribed. This is not so. It fell due on demand. The cause of action accrued, therefore, only when the demand was not met by payment. This disposes of the one plea. As to the other, the stamp is sufficient, and the case is governed by clause 21 of Ordinance 11 of 1861. By the terms of the document, if default be made, interest becomes due from the date of the making of the bill." Promissory note payable on demand. Prescription.

In appeal, Grenier for appellant. The Commissioner was clearly wrong on the law. Prescription commenced to run from the date of the note and not from the time of the demand. *Christie* v. *Fenswick,* 1 Selw. N. P., 136, 361 ; *Megginson* v. *Harper,* 2 C. & M., 322. [CAYLEY, J.—The authority of those cases seems to be doubted. See Byles.] But the point was definitely decided in a later case, *Norton* v. *Ellam,* 2 M. & W., 461.

Per CAYLEY, J.—" Set aside and judgment for defendant on the plea of prescription. Prescription runs against a promissory note payable on demand from the date of the note and not from the date of the demand, unless the note be accompanied by some writing restraining or postponing the right of action. See Byles on Bills, p. 341 ; Norton v. Ellam, 2 Mees. and Welsby, p. 461."

May 26.

Present CAYLEY, J.

No appeal lies from an interlocutory order.

C. R. Avisawella, 9288. The plaintiff in this suit complained that defendants had encroached on his property, called the Kattubodda Estate, to the extent of one fourth of an acre, valued at Rs. 75. The answer filed was as follows :

"The defendants for answer, reserving their defence on the merits, say that the land in dispute is worth more than Rs. 100 in value, and that therefore the case is beyond the jurisdiction of this Court. They pray that plaintiff be nonsuited."

The Commissioner (*Byrde*), having heard evidence on both sides, held that he had jurisdiction, whereupon the defendants appealed.

Browne, for appellants. [CAYLEY, J.—What right of appeal have the defendants ? I am inclined to think that the case was beyond the jurisdiction of the Court below, but there is no final judgment in the case or any order having the effect of a final judgment. See section 20 of Ordinance 11 of 1868.] The plea to the jurisdiction was properly taken in the first instance before pleading to the merits, (Lor. Civ. Prac., 24 ; C. R. Jaffna, 9513, Nell, 185) as it would be a waste of time to investigate intricate land cases when it could be shewn *in limine* that the Court had no jurisdiction. Hence the Commissioner was bound to decide the question of jurisdiction, and his judgment thereon was a final order from which appeal could be taken. The hardship of enforcing a hearing on the merits, when such a plea would avoid the time and expense of a trial, was increased by the fact that the defendant, if successful, could not recover his costs. (Lawford v. Partridge, 5 W. R., 295.)

Grenier, for respondent. The judgment appealed from was only an interlocutory and not a final order. (*In re* de Raymond, *D. C. Colombo*, 2784, Crowther's Reports, p. 52.) In that case, Mr. Justice THOMPSON defined the difference between an interlocutory and a final judgment as follows :

"Interlocutory judgments are those given in the middle of a cause upon some plea, proceeding or default which is only intermediate and does not finally determine or complete the suit; such, for example, as a judgment on a plea in abatement or a judgment on demurrer, where an issue of fact is yet to be tried, or a judgment by default where the damages have yet to be assessed ; or generally any decision which establishes a right but does not hand over to the Plaintiff the specific thing sued for, whether that be damages, debt, a chattel, land, a title or a trust. Final judgments are those that at once put an end to the suit, by declaring that the Plaintiff has either entitled

himself or has not to recover or obtain the specific thing (corporeal or incorporeal that he sues for."

No appeal lies from an interlocutory order.

It would be open to the appellant, in the event of a wrong finding by the Commissioner on the question of jurisdiction, to press the objection while appealing from the final decision in the case, and the Supreme Court would then review any interlocutory order which might have been erroneously made. C. R. Harrispattoo, 2545, Civ. Min., 8th October, 1861.

Per CAYLEY, J.—" It is ordered that the appeal lodged in this case on the 17th January, 1874, be dismissed. In this case the defendants pleaded to the jurisdiction, reserving their defence on the merits, until the question of jurisdiction should be determined. The learned Commissioner has decided that he has jurisdiction to try the case; and from this decision the defendants have appealed. It appears to me that this decision is neither a final judgment between the parties, nor an order having the effect of a final judgment, and consequently that no appeal will lie from it to this Court. The decision settles nothing as to the real matters in dispute between the parties, but merely determines that the Court of Requests has power to hear the case; and, if this decision is erroneous, there is nothing to prevent the Supreme Court from reviewing it at the hearing of the appeal from the final judgment. The difference between interlocutory and final judgments is fully discussed in the late Mr. Justice Thompson's judgment in the case No. 2784, District Court, Colombo, (Supreme Court Minutes, 24th July, 1863) cited by the respondent's Counsel. That learned Judge there defines final judgments as those that at once put an end to the suit, by declaring that the plaintiff has either entitled himself, or has not, to obtain the specific thing (corporeal or incorporeal) that he sues for. The present decision has certainly no such effect. The case is not like that of a suit being struck off or dismissed by a Court of Requests on the ground of want of jurisdiction. A decision of that kind would finally determine (so far as the Court of Requests was concerned) that the plaintiff had no right to recover, and conseqnently might be appealed against. Appeals in cases of this kind are somewhat analogous to appeals against orders opening up, or refusing to open up, judgments by default. It has been held by this Court that no appeal will lie against an order opening up a judgment, on the ground that such an order is neither a final judgment nor one having the effect of a final judgment, (see No. 2545, Court of Requests, Harrispattu, Supreme Court Minutes, 8th October, 1861); whereas appeals

against orders refusing to open up judgments are frequently entertained ; for such a refusal has the effect of finally confirming the plaintiff's right to retain the benefit of the judgment in his favor."

Malicious prosecution.

C. R. Colombo, 95424. The plaintiff charged the defendant with having, maliciously and without reasonable or probable cause, prosecuted him for theft, and claimed damages of Rs. 100. The answer justified the prosecution. It appeared from the evidence that the defendant had sworn an affidavit before a Justice of the Peace charging the plaintiff with theft ; that having obtained a warrant he had caused plaintiff's premises to be searched (without however any articles claimed being found) ; and that on the day of trial he had withdrawn the charge, without any attempt to prove the same. The only explanation offered for the defence, as to the J. P. case, was contained in defendant's evidence which was as follows :

"My house was robbed. I suspected the plaintiff, because he informed me of the fact of the robbery, and his companions are men of suspicious character.

Cross-examined. At the time I filed my affidavit, I had received no information against the plaintiff."

The Commissioner (*Livera*) having given judgment for plaintiff for the full amount claimed by him, the defendant appealed.

Per Cayley, J.—"Affirmed. In actions for malicious prosecutions, it is no doubt incumbent upon the plaintiff to prove malice and want of probable cause, but malice may be, though it need not necessarily be, inferred from the want of probable cause. See Mitchell and Jenkins, 5 B. and Ad., 588. In this case the Commissioner appears to have drawn such inference ; and this Court sees no reason to interfere."

May 29.

Present Cayley, J.

Decisory oath.

C. R. Colombo, 96570. This was an action for use and occupation. The defendant denied that he had occupied the plaintiff's house as alleged, but admitted that he had stored some rice in it, and that, according to agreement, he was liable to pay only warehouse rent at six cents per bag. On the day of trial, after the examination of the parties, the Commissioner (*Livera*) made order as follows :—

"The defendant, through his Counsel, states he will allow judgment to be entered against him as prayed for, if the plaintiff would swear at the Mosque that he is entitled to what he claims by agreement. The plaintiff

undertakes to swear. Peon Gregorie to accompany the plaintiff to the temple and report whether the oath has been taken or not." Decisory oath.

On the following day, the peon, being sworn, stated :

" The plaintiff refused to swear as he undertook to do. He refused to swear on the Koran. The Lebbe of the Mosque was ready to hand the Koran, but the plaintiff refused to swear if the Koran was produced. I have often accompanied parties to the Mosque upon orders from the Court, and invariably the oath was taken on the Koran."

The Proctor for the plaintiff thereupon stated that he was ready to go to trial ; but the Judge nonsuited the plaintiff in the following terms : " As the plaintiff undertook to swear and did not, he is nonsuited with costs. It is an understood thing in this Court, and invariably the practice, when a party who undertakes to take his oath refuses to do so, that he should lose the case."

In appeal, (*Grenier* for appellant, *Ondaatjie* for respondent,) per CAYLEY, J.—" Set aside and case sent back for trial. Costs in the Court below to stand over. It does not appear that the plaintiff agreed to be nonsuited if he failed to swear to his claim in the Mosque ; and consequently the fact of his having refused to take this oath will not deprive him of his right—to prove his case. The decisory oaths in temples, when taken by consent, have, I believe, been recognised by this Court, but not, so far as I am aware, approved. Whatever question there may be as to their lawfulness or unlawfulness, I have no doubt as to their inexpediency. It seems to me highly inexpedient to delegate the important function of administering an oath to persons who are not authorized by law to administer oaths, who are under no judicial authority, and whose action in the matter is subject to no supervision ; and still more inexpedient to encourage persons to take oaths for the infraction of which they make themselves liable to no temporal penalty whatever."

C. R. Galle, 38392. This was an appeal against an order refusing to re-issue summons.

Practice. Opening up judgment.

Per CAYLEY, J.—" Set aside and fresh summons to issue. It would not have been competent for the Commissioner to have reopened the case if the plaintiff had been nonsuited, but the case was merely struck off without any nonsuit having been entered. It seems to have been struck off, because of the report that the defendant was dead, a report which, if the plaintiff's affidavit is to be believed, was not only false but the result of a conspiracy between the defendant and the process-server."

June 2.

Present STEWART and CAYLEY, J. J.

Jurisdiction. Costs.

C. R. Panadure, 16129. The plaintiff in this suit (which involved a dispute as to some lands) was non-suited with costs, on the ground of want of jurisdiction. The plea, though not taken in the answer, was raised by defendant's Proctor at the trial after plaintiff had closed his case.

In appeal, Grenier for appellant. The Court below had no right to award costs. C. R. Kandy, 33130, Civ. Min., June 8, 1865. (*Layard*, for respondent, was not heard.)

Per CAYLEY, J.—" Affirmed as a dismissal, but without costs. The case having been found at the hearing to be beyond the jurisdiction of the Court of Requests, that Court had no power to make any order as to costs."

June 5.

Present STEWART and CAYLEY, J. J.

Jurisdiction. Costs.

C. R. Anuradhapura, 954. The plaintiffs in this case were nonsuited with costs by the Commissioner (*Gray*) in the following judgment : "The plaintiffs have entered a case for the same land in the District Court, thereby admitting their claim to be beyond the jurisdiction of this Court. The defendants have pleaded excess of jurisdiction. As a plaintiff is bound to know the value of the land he claims (Point Pedro case, No. 1497, in appeal), a nonsuit with costs would appear to be the only convenient penalty for understating the value." The Commissioner further cited C. R. Kandy, 31956, and C. R. Kegalle, 649.

In appeal, per CAYLEY, J,—" Set aside and order made that the suit do abate, each party paying his own costs. The cases cited by the learned Commissioner, so far as they raise the inference that Courts of Requests have power to nonsuit with costs in cases where the suit is beyond their jurisdiction, and when the jurisdiction is pleaded to, have been virtually overruled by many subsequent express decisions of this Court ; and the law on the point must be considered as settled. In the case of *Lawford* v. *Partridge*, (26 L. J., Exch., 147) there was put forward a similar argument to that urged by the learned Commissioner in his judgment, viz., that the Court had jurisdiction to decide whether or not the case came within its jurisdiction. But it was held by the Court of Exchequer that, as soon as the want of jurisdiction appeared, the Court below had merely the power to declare its own incompetency and direct that the suit should abate."

August 21.

Present MORGAN, C. J.

C. R. Panwila, 4682. The facts of this case are sufficiently set forth in the following judgment of the Supreme Court. Arbitrator's fee. Separate action.

"Set aside and defendant decreed to pay Rs. 21 to the plaintiff. Costs divided. The plaintiff had an action against the defendant, which was referred to arbitration and decided against the latter. The plaintiff issued writs and recovered the amount of damages awarded and costs; and he now seeks to recover the amount paid to the arbitrator. The Commissioner nonsuited plaintiff, considering that the amount could not be legally recovered, as it was not included in the bill of costs. This is a good reason for disallowing plaintiff his costs in the present case, but not for disallowing him the sum which the defendant was liable to pay in the first instance, but which the plaintiff paid on his account."

August 28.

Present MORGAN, C. J.

C. R. Kalts, 5472. Plaintiff having obtained an order of Court to enforce a stale claim, the defendant appealed. Presumption of payment.

Per MORGAN, C. J.—"Set aside and plaintiff's claim is dismissed with costs. The lapse of time, between 1864, when judgment was entered, and 1873, when the motion is made to reissue writs, affords strong presumption in favour of defendant's plea of payment."

C. R. Matara, 28170. A judgment of non-suit in this case was altered into a dismissal; and per MORGAN, C.J.—"A mortgagee is not bound to receive a portion of his debt and to release a portion of the property mortgaged to him." Mortgage.

C. R. Panadure, 16719. The Commissioner's order, directing a claimant to institute a case in support of his claim in execution, was set aside; and per MORGAN, C. J.—"The claimant is in possession, and it is for the plaintiff to institute his case." (*Layard* for appellant, *Ferdinands* for respondent.) Claim in execution.

Nonjoinder. Plaint allowed to be amended.

C. R. Matara, 28830. This was a suit by plaintiff to recover damages consequent on injuries sustained by his child, who was bitten by defendant's dog. The Commissioner having entered a nonsuit, on the ground that the action was maintainable only against a third party who had set the dog at the child, the plaintiff appealed.

Per MORGAN, C. J—"Set aside and plaintiff allowed to amend his plaint and make David Sinho also a party. The case to be then set down for trial. David Sinho urged on the dog to bite plaintiff's daughter, but the defendant had no business to keep an animal of ferocious habits. They are both wrong-doers." (*Grenier* for respondent.)

Damages.

C. R. Gampola, 29532. This was an action by plaintiff to recover the value of a buffalo which had been killed by defendant's buffaloe. Plaintiff having obtained judgment, the defendant appealed.

Per MORGAN, C. J.—"Set aside. The defendant's buffaloe was carefully tied to a tree, and plaintiff's servant had fair warning not to let plaintiff's buffaloe loose. He disregarded the warning, and the animal, no sooner he was let loose, flew at the defendant's and was gored to death." (*Grenier* for appellant.)

September 4.

Present MORGAN, C. J. and CAYLEY, J.

Decisory oath.

C. R. Colombo, 94797. The defendants undertook in the Court below to allow judgment to be entered in plaintiff's favour, if plaintiff would swear at St. Anthony's Church, in the presence of a priest, to the truth of the plaint. The plaintiff's Proctor having subsequently produced a certificate from the priest, to the effect that the oath agreed upon had been taken, the Commissioner (*Livera*) gave judgment for plaintiff, although the defendants objected to the oath as insufficient.

In appeal, (*Browne* for appellants, *Ferdinands* and *Alwis* for respondent) the judgment was set aside and case remanded for the Commissioner to hear evidence, the defendants paying the costs of the trial, costs in appeal being divided; and per

Decisory oath.

CAYLEY, J.—" The Supreme Court is unwilling to encourage references to oaths of parties to be taken at churches or temples. If parties have sufficient confidence in each other to make such reference, the Court might assist them by putting off the case so as to carry out their purpose; but it is not expedient that such references and the conditions which attach to them should be made the subject of a rule or order of Court. In this case judgment is entered on the bare certificate of the priest. It does not clearly appear that the parties agreed to such a condition, the record of the Commissioner simply shows that 'it is understood that a bare certificate from the priest will be sufficient.' As the defendants, however, by their offer to refer the case to the oath of the plaintiff, stopped the trial on the 13th March last, they should pay the costs of that day."

Plea of payment.

C. R. Matale, 30321. The decree of the Court below was set aside and judgment entered for plaintiff with costs, and per MORGAN, C. J.—" The defendant supports his plea of payment by the evidence of his son-in-law, while there were, according to his account, two strangers present who were not called. It is most improbable that the defendant would have paid without either taking back his note or getting a receipt, particularly as the payment is alleged to have taken place after the plaintiff put his note in suit."

Public holidays.

C. R. Galagedere, 31167. The plaintiff having been absent on the day fixed for the trial (Ascension-day), he was nonsuited with costs.

In appeal, per MORGAN, C. J.—" Set aside and case sent back to be proceeded with. Costs to stand over. Ascension-day is a public holiday in this country, and it appears from Mr. Staples' affidavit that, relying on this, he directed his client not to attend Court."

Contract to carry Coffee. Liability of consignee to pay hire.

C. R. Ratnapura, 8908. On the 13th November, 1873, Migil Silva contracted at Haldamulla with Mr. Pineo to carry coffee to Ratnapura and deliver it there at the Store of Messrs. Glenny & Co. The printed form of cart note, as filled up, was as follows :

Contract to carry Coffee. Liability of consignee to pay hire.

Received from Richard E. Pineo the undermentioned goods, in good order and condition, which we agree and hereby bind ourselves jointly and severally to convey and deliver in like good order and condition, within 8 days from this date, (and for every additional day's delay we agree to forfeit the sum of 75 cents for each cart per diem) to Ratnapura, for the consideration of the sum of Rs 35, being the hire agreed, and having received the herein specified advance of Rs 10 hire at estate. Rs 25, the balance as herein stated, to be paid to us on correct delivery of the goods at Ratnapura to Messrs. Glenny and Co.

(Signed) Migil Silva.

The cart notes were signed in triplicate, and due delivery was made, on the 20th November, of the coffee to Messrs. Glenny & Co. by a carter named Juse P erera, who produced one of the forms as a hand-note. According to the custom of business, as deposed to by Mr. Pineo in his experience of fifteen years, the man who delivered the coffee was always paid the balance hire. Before Juse Perera was paid, the Deputy Fiscal of Ratnapura sequestered the amount of the balance hire in the hands of Messrs Glenny & Co. under a writ against Juse Perera, and Messrs. Glenny & Co. paid the amount into Court. Migil Silva then demanded of Messrs. Glenny & Co. payment to himself, as the contractor, of the balance hire, and brought the present action against them to recover the amount. In his evidence, he deposed that he himself delivered the coffee and that Juse Perera was one of his cart drivers. The Commissioner (*Neville*) dispensed with the evidence tendered by the defendants to prove that delivery was made by Juse Perera and not by Migil Silva, and said "while I will not deny that defendants were fully justified in paying the carrier's carter (if, as they assert, he actually delivered the goods) the hire due on the way-bill, yet, when it was shewn that he was not the contracting carrier, they are not justified in refusing to pay the contractor and saying they are only liable to pay his workman or agent. Payment to the agent is legitimate, but payment to the contractor himself on his application is absolutely necessary." Judgment was accordingly entered for the plaintiff for the amount of the balance hire, interest and costs. From that judgment the defendants appealed, on the grounds (1) that they were no parties to the contract between respondent and Mr. Pineo, but, acting only as receiving agents for the consignor, were liable only to pay the balance hire to the person actually delivering the coffee, which person was not expressly named in the way-bills; (2) that the appellants were justified, under the sequestration, in the course they adopted of

Contract to carry Coffe. Liability of consignee to pay hire.

paying the money into Court; (3) that the evidence tendered should have been received and judgment entered in their favour.

In appeal, Browne, for appellants, pressed the points raised in the petition of appeal, and said that the question so seriously affected the future conduct of the appellants' business that the appeal concerned a far larger question than merely the costs of suit. To uphold the continuing liability of the receiving agents to the contractor would be to overthrow the custom of trade, which had always released them on payment to the person who actually delivered the goods. The carter was the agent of the carrier, appointed by delivery of the hand-note and of the goods to his care, to receive the money, and as the appellants would be discharged from their liability by payment to him, they were equally discharged by their payment, to the Fiscal, of the money claimed as his. The respondent should have made his claim against the creditors of the carter, and not against the appellants, on whom in no way rested the duty of determining the rights of the several claimants.

Layard, for respondent. The appellants only pleaded in their answer that the respondent was not the carrier, and did not plead that they were discharged by the payment to respondent's agent, nor that they were not liable under the contract between respondent and the consignor. Hence they could not dispute their liability to plaintiff thereunder.

Per CAYLEY, J.—"Set aside and plaintiff nonsuited. The contract embodied in the cart note is a contract between the plaintiff and Mr. Pineo, and not between the plaintiff and the defendants. The plaintiff agrees with Mr. Pineo to carry certain coffee for him and to deliver it at Ratnapura to the defendants, who appear to be Mr. Pineo's agents for receiving it. The defendants are no parties to this contract, and cannot be held liable for any breach of it to the plaintiff, whatever their liabilities may have been to their principal, Mr. Pineo, with regard to receiving the coffee and paying the balance cart hire. The objection which is taken in the 1st paragraph of the petition of appeal appears to us fatal to the plaintiff's claim, and it is therefore unnecessary to send the case back in order that the evidence which was tendered, but rejected by the Commissioner, as to who in point of fact produced the cart note and delivered the coffee to the defendants, may be taken."

September 15.

Present CAYLEY, J.

Window right.

C. R. Colombo, 96134. The plaintiff complained that the defendant had erected a new boundary wall and had extended the roof of his house over a portion of plaintiff's land, and that the defendant had further opened in the said boundary wall two windows overlooking plaintiff's land. The Commissioner (*Livera*) nonsuited the plaintiff in the following terms. "The Surveyor selected by the parties to report on the alleged encroachment states that in his opinion the defendant's roof overhangs the plaintiff's premises 8½ inches in breath and 50 feet in length. I regret I cannot agree with him, because he appears not to have taken into account the breadth of the boundary wall. I agree with the defendant that he has a right to have as many windows as he likes on his own wall."

In appeal, (*Ondaatjie* for appellant, *Grenier* for respondent), per CAYLEY, J.—"Set aside and case sent back for a further hearing as to the ownership of the ground marked *green* in the survey. All costs to stand over. Two questions are raised in this case; one as to the right of the defendant to extend the roof of his house over the land marked *green* in the survey; and the other, as to the right of the defendant to open in his wall two windows, so as to overlook plaintiff's land. As no right of easement by grant or prescription is pleaded or proved, the first question simply depends upon the ownership of the ground marked *green* in the survey; and with regard to this point, I think that the case should receive further investigation. From the configuration of the ground, as appearing in the survey, it would seem more probable that the land marked *green* formed part of plaintiff's than of defendant's portion; otherwise it is difficult to understand why the boundary extending from the road should not have been continued throughout its length in the same right line in which it runs about half way. It does not appear from what materials or *data* the Surveyor derived his conclusions; and a mere comparison of admeasurement given in old title deeds is, in cases of this kind, where there has probably been a long possession on one side or the other, a somewhat fallacious test of title to a narrow strip of boundary land. On this point the case must go back for further enquiry, and evidence of possession should be adduced. Considering, however, the trivial value of the strip of land in dispute and the facility with

o bring a fresh action on a security bond for the performance of a judgment."

C. R. Newera Eliya, 4359. This was an action to recover rent; but the defendant claimed the house as his by right of purchase. On the affirmation of the plaintiff that the house was worth £45, the Commissioner (*Hartshorne*) nonsuited the plaintiff with costs, as the case was beyond the jurisdiction of the Court. Jurisdiction. Costs.

In appeal, per CAYLEY, J.—"Set aside and ordered that the suit do abate, each party paying his own costs. The Commissioner has no power to award costs, when the case is beyond the jurisdiction of the Court of Requests."

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of money awarded by Court, and shall abide by and perform the judgment of the said Court, or shall surrender himself or be surrendered by his bail to be charged in execution, then the bond to be void; otherwise to remain in full force." Judgment having subsequently been entered by consent in favor of the plaintiff, his Proctor moved for a notice on one of the sureties to shew case why writs should not issue against his property in satisfaction of the judgment, as the defendant had left the island leaving no property seizable in execution. Cause having been shewn on behalf of the security, the learned District Judge (*Worthington*) held as follows: "On the authority of Voet, 2, 8, 17 and Morgan's Digest, 60, 61, the Court decides the plaintiff cannot be allowed his remedy in this case, there being no precedent in the practice of the District Court."

In appeal, (*Ferdinands*, for appellant) per CAYLEY, J.—"Set aside and case sent back for further hearing and consideration. It is the practice in the District Court of Colombo, when security has been given for the performance of a judgment, to allow the liability of the sureties to be determined in the same case in which the judgment has been entered against the principal, without requiring the plaintiff to commence a fresh action; unless it is shown in any particular case that such a course would be manifestly inconvenient or prejudicial to the interests of the sureties. This practice, which is sanctioned by Voet (ii. 8. §. 17.) and referred to, as a common one, by Sande (Dec: Fris: iii, tit: 10, def: 3), should be followed in the other Courts of the Island, as it tends to prevent unnecessary delay and expense. Full notice must, of course, be given to the sureties, and the proper course is to apply for a Rule against them. In certain cases it may be advisable to refer the plaintiff to a fresh action, but in the present instance no valid reason has been shewn for adopting such a course, and there is nothing to prevent the sureties availing themselves in this case of any defence they may have, in as full and effectual a manner as if a separate action were brought against them. As the practice in the Batticaloa Court has hitherto been different, parties will bear their own costs respectively." (See Civil Minutes, 18th September, 1874.)

Judgment opened up. Delay in deciding case.

C. R. Matale, 29860. This was an appeal by defendant against the following order of the Commissioner. "Defendant's Counsel agrees to judgment by default instead of exparte hearing. Judgment for plaintiff with costs."

Per CAYLEY, J.—"Set aside and judgment against defendant ordered to be opened up, if appellant shall pay into Court the sum of Rs 30, to meet the costs of the case, within 7 days of the record being received back by the Court below; otherwise, order appealed against to stand affirmed. All costs will stand over. The affidavit filed by the appellant appears to this Court to be sufficient to warrant the opening up of the judgment. The appellant's Proctor does not seem to have consented to judgment going in any case against his client, but merely to have accepted the alternative offered to him of judgment by default or an *ex parte* hearing. It appears by the record that appellant attended Court on no fewer than 8 several occasions, and was ready on each occasion to go to trial, but on the 9th was disabled by illness from coming to the Court. The fact that the parties and their witnesses have had to travel to Court 8 several times, during a period extending from 7th October, 1873, to 7th July, 1874, before a case involving a claim of Rs. 80 only could be disposed of, is a matter which this Court cannot pass over without comment. Such a state of things in any Court, and especially in Courts established for the trial of small causes, must amount in many cases to an absolute denial of justice. Not a few persons would rather submit to a small claim, however unjust, than subject themselves to the expense, delay and vexation of so many postponements. Most of the postponements in this case appear to have been due to the Court not having had time to take up the trial on the day for which it was from time to time fixed. But care should be taken not to set down for trial on any particular day more cases than there is a reasonable probability of the Court being able to try on that day. It is better that the trial roll should extend to a more distant date, than that the parties and witnesses should be put to the inconvenience of coming so frequently to Court to no purpose."

Practice: Filing answer.

C. R. Matale, 31368. A judgment by default in favour of plaintiff was set aside in appeal and case sent back to be proceeded with, if defendant should file his answer within seven days of the case being returned to the Court below.

Practice. Filing answer.

And per Cayley, J.—"The defendant appeared on the returnable day of the summons, but it does not appear whether he was called upon to answer the plaint as provided by the Court of Requests rules and orders, 10. If he were so called upon and denied the claim of the plaintiff and did not choose to state his answer to the Chief Clerk, he would be entitled to the whole day for filing a written answer."

October 6.

Present Morgan, C J. and Cayley, J.

Assignment of judgment.

C R. Mallakam, 1787. In this case the widow of the judgment creditor assigned the judgment to one Visuvanathen, who in turn assigned the same to one Vairamutto. The second assignee now moved to revive judgment and reissue writs. The defendant objected on several grounds amongst which were the following: (1) that the alleged widow was not the lawful wife of the original creditor and had no right to assign; (2) that the debt had been already paid to the first assignee. The Commissioner (*Livera*) held as follows: "The defendant is estopped from denying the assignment in favour of Visuvanathen and to prevent Visuvanathen's assignee issuing writs against him. The defendant ought to have proved payment. Failing this, the motion to reissue writs is allowed with costs."

In appeal, per Cayley, J.—"Set aside and case sent back for further hearing and consideration. The statement of the defendant in his examination that he paid Visuvanathen, upon Visuvanathen's assurance that he had bought the judgment, will not estop the defendant from denying in the present case either the fact or the validity of the alleged assignment in Visuvanathen's favour. In the first place, it is possible that Visuvanathen's statement, that he had bought the judgment, may have been untrue, for the judgment may have been assigned to him by persons who had no right to assign it; and, in the next place, such a payment, if made, cannot operate as an estoppel in favour of the respondent. The present respondent could in no way have been misled by any such payment into purchasing the judgment from Visuvanathen. For, if the money was really paid to Visuvanathen, before he assigned the judgment to the respondent, and the respondent knew this, that assignment is not only inoperative, but the transaction is a fraudulent one, in which both the respondent and Visuvanathen are equally implicated. If

Assignment of judgment

the payment was really made before the assignment to the respondent, the respondent's claim falls to the ground; and this payment should not first be assumed in order to estop the defendant, and then denied in order that the judgment may still be taken as unsatisfied."

October 9.

Present Morgan, C. J. and Cayley, J.

Proctor's fees.

C. R. Panadure, 16110. The plaintiff (*B. O. Dias*), who was a Proctor of the District Court of Kalutara practising in the Minor Courts at Panadure, sought to recover a sum of Rs 100, "being "fees due for professional services rendered to the 1st defendant "(who was charged with highway robbery before the Supreme "Court) at the request of the 2nd defendant." The 1st defendant admitted, in his answer, having retained the plaintiff to defend him at Panadure in the preliminary J. P. case, and having subsequently taken him to Colombo to instruct the Advocate who conducted the defence in the Supreme Court, and alleged that he had paid plaintiff at the time the retainer which had been demanded. The 2nd defendant pleaded not indebted and denied that he had ever retained plaintiff. Before the trial, the 1st defendant amended his answer by further pleading that the plaintiff was not entitled in law to recover the fees in question. On the issues thus raised, the Commissioner (*Ellis*) held that he believed the plaintiff had not been remunerated at all for his services in the Supreme Court, and that plaintiff was fairly entitled to charge Rs 10 a day for the ten days he had been in Colombo on account of the defendant's case.

In appeal, Grenier, for appellant. The Rules and Orders (page 107) provided only for fees in the Appellate Court, recoverable by Proctors of the Supreme Court. Mr. Dias was only a Proctor of the District Court and as such not entitled to practise in the Supreme Court. There was no special contract alleged or proved in this instance, nor was there a signed bill presented or a month's notice given. R. and O., 6th January, 1846; Hill v. Wright, 5 Scott, 662; and Scadding v. Eyles, 9 Q. B., 858, in which case it was held that even an account stated did not render unnecessary the delivery of a signed bill.

Per Cayley, J.—"Set aside and plaintiff nonsuited. Parties to bear their own costs respectively. In this case the plaintiff, who is a Proctor of the District Court of Kalutara, sues the defendant

to recover the expenses incurred by him in attending the Supreme Court, for the purpose of assisting the first defendant at his trial before the Supreme Court on a criminal charge. The 2nd defendant appears to have undertaken to pay these expenses, which were to be incurred on behalf of the first; but, as the 1st defendant is also sued, it is clear that he was considered to be liable also; so that the engagement of 2nd defendant was in the nature of a guarantee, and the contract, not having been in writing, is void as against him by the Ordinance of Frauds. With regard to the liability of the first defendant, an objection was taken at the hearing of the appeal that the plaintiff had not, as required by the Rules and Orders of the 6th January, 1846, one month previously to action, delivered to the first defendant a duly signed bill of his fees, charges and disbursements; and it appears to us that this objection is fatal to the plaintiff's claim; for nothing can be clearer than the language of the Rules and Orders referred to. It is true that it was held in the case of Lane v. Prideaux, 7 Ad and E., 83, that an objection of this kind must be specially pleaded; but in Courts of Requests cases, in which the parties frequently (as in the present instance) have no professional assistance, manifest injustice would often ensue if it were necessary to enforce the strict rules of pleading observed in the English Courts of Common Law. The plaint indeed itself is informal, as omitting all reference to the fact that the plaintiff is a Proctor and is suing for services rendered by him as a Proctor. It is quite clear that no such bill was ever delivered, and indeed no bill or particulars whatever were filed with the plaint. The plaintiff has not thought fit to instruct Counsel to appear for him in this Court, and as only one side has been heard, we shall not give any opinion on the general question whether a District Court Proctor can sue for fees and charges for assisting a client in criminal proceedings had before the Supreme Court." Proctors fee's.

C. R. Matale, 2918. The plaintiff claimed an undivided one-fourth of a certain land. The Commissioner held that as the value of the entire land exceeded Rs. 100, he had no jurisdiction to try the case. Jurisdiction.

In appeal, per Cayley, J.—" Set aside and case sent back to be proceeded with. All costs to stand over. Under the Ordinance 8 of 1859, section 8, the value of the land in which an interest is claimed (and not the value of the interest claimed in the land)

Jurisdiction. was made the criterion of jurisdiction in Courts of Requests cases; but, in this respect, the law has been altered by the Ordinance 11 of 1868, by the 81st section of which jurisdiction is given to the Courts of Requests to try the case, if the value of the particular share claimed does not exceed one hundred Rupees (Rs. 100), whatever the value of the entirety may be."

October 16.

Damages. Shooting a cow.

Present MORGAN, C. J., STEWART and CAYLEY, J. J.

C. R. Ratnapura, 9108-9220. The plaintiff sought to recover the value of a cow belonging to him which had been shot by the defendant. The Commissioner (*Neville*) nonsuited the plaintiff, on the gronnd that the defendant had not acted with any "malicious intent." The facts of the case and the law applicable thereto are set forth in the following judgment of the Supreme Court.

Ferdinands, for appellant. It was not necessary to prove malice. The defendant was liable as by ordinary care he might have avoided the accident. Leame v. Bray, 8 East, 599; Addison on Torts, 183, 366.

Per CAYLEY, J.—" Affirmed. In this case the defendant, who had gone with a gun at night to protect his yam plantation, heard the noise of an animal eating his yams; thinking it was a wild pig, he fired in the direction from which the sound proceeded and shot the animal, which was then discovered to be the plaintiff's cow. The plaintiff has sued the defendant for the value of the animal, and has been nonsuited; and we think that the nonsuit is correct. There is no doubt that if the defendant had knowingly shot the cow, he would have been liable in damages: for his act would not have been justified by the trespass of the animal. In such case, the maxim 'injuria non excusat injuriam,' would apply. It was not disputed that, if the defendant had set a trap in his plantation to catch wild beasts, and the plaintiff's cow had fallen into it and had so been injured, no action would lie. See the judgment of Gibbs, C. J. in the case of Deane v. Clayton, 7 Taunt, 489, which was expressly approved of in the case of Jordin v. Crump, 8 M. and W. 789. See also Voet, lib. ix, tit. 2, § 18. Whether the setting of an instrument so dangerous to human life as a spring gun is lawful or not, it is not necessary here to inquire. But it was contended that, though setting a trap might be allowable as a protection to property in

Damages. Shooting a cow

the owner's absence, still if the owner is present his intelligence requires him to exercise discretion, and that the defendant in the present case might before firing have easily ascertained whether the animal eating the yams was a wild pig or a cow. But we do not think that a man is bound to exercise, under the circumstances referred to, a caution which must entail considerable personal risk to himself. A wild boar is a dangerous animal, and we cannot see that any duty was imposed upon the defendant to incur the risk of an encounter with a beast of this kind, in order to avoid injuring a cow, the owner of which ought to have prevented it from trespassing."

October 20.

Present Stewart and Cayley, J. J.

Mesne profits. Prescription.

C. R. Matura, 27332. Plaintiff claimed damages for two years, in consequence of defendants having had unlawful possession of plaintiff's land which had been judicially decreed to him two years before the institution of the present suit; but the Commissioner (*Jumeaux*), in nonsuiting the plaintiff on his mere admissions, held—"He cannot proceed on with the case. He admits that defendants have had forcible possession of his land ever since the last 9 years, and he claims damages in consequence. The 10th clause of Ordinance 22 of 1871 says 'no action shall be maintainable for any loss or injury or damages, unless the same shall be commenced *within 2 years from the time when the cause of action shall have arisen.*' Now plaintiff admits that the cause of his present action arose 9 years ago. The present action is therefore prescribed. The plaintiff in the District Court case 25140 claimed damages for this very same cause, and had the learned Judge considered him entitled to any damages, he would have decreed them to him. From his not having done so, I must conclude that he did not consider plaintiff entitled to any damages."

In appeal, (*Browne* for appellant), per Cayley, J.—"Set aside, and case sent back for further hearing. Plaintiff's claim for mesne profits, in the nature of damages arising during the two years previous to the institution of the action, will not be prescribed. This claim was not in issue in the case No. 25140, District Court; for in that case the damages claimed were for two years previous to the filing of the libel, i. e., previous to April 1870, whereas the present action was not brought until 1873."

November 27.

Present Morgan, C. J., Stewart and Cayley, J. J.

Right of fishing.

C. R. Point Pedroe, 6570. The plaintiff claime d by prescriptive right the exclusive privilege of using certain nets, called *kaddoovalai*, for catching prawns and shrimps in a certain portion of the sea at Tondemanaar, and, alleging disturbance of this right by the defendants, claimed damages. The defendants in their answer denied the plaintiffs' claim and pleaded their right, by prescription, of fishing in the place in question, and also that they had at considerable trouble and expense removed a sand-bank in order to exercise such right. The Commissioner (*Drieberg*) dismissed the plaintiffs' claim, disbelieving the evidence adduced on their behalf, and entered judgment for the defendants " for the lots claimed by them as per survey filed, with Rs. 20 as damages."

In appeal, Grenier, for respondent, on being called upon, submitted that the Commissioner had gone beyond what had been asked for by the respondents, who would be satisfied with a decree for the mere right of fishing in the locality in question.

Per Cayley, J.—" Affirmed, but judgment in favour of defendants set aside. Even supposing that the defendants could acquire a prescriptive right to the fishing lots claimed (upon which the Supreme Court expresses no opinion), it would require much stronger evidence to prove it than has been adduced in this case. Plaintiffs will pay the costs in the Court below. Parties respectively will bear their own costs in appeal."

December 1.

Present Morgan, C. J. and Stewart, J.

Partition suits.

C. R. Panadure, 16635. The question in this case was whether a Court of Requests had power to decree a partition. The Commissioner having at the instance of the plaintiff ordered a partition of a land alleged to be worth Rs. 100, the defendant appealed.

Per Morgan, C. J.— " Set aside. Costs divided. The Ordinance 21 of 1844 required applications for partition to be made to District Courts ; but at that time Courts of Requests had no jurisdiction whatever in land cases. The Ordinance No. 22 of 1852 gave these Courts jurisdiction for the first time in land cases, empowering them to try all actions in which the title to, or the right to the possession of, any land is in dispute, provided that the value of the land shall not

exceed £10. (Sec. 3.) The Ordinance No. 8 of 1859 followed the same words with the addition of the words 'interest in' after the words 'title to' and before the words 'or the right to the possession of, &c.' The 23rd section gave the Courts of Requests jurisdiction to do any thing required to be done before the District Court, or by or before a Judge or other officer of a District Court; but such things were required to be in relation to any cause, suit, action, matter or thing which by that Ordinance was made cognisable by Courts of Requests. The Partition Ordinance, No. 10 of 1863, did not specify District Courts, but required applications for partition to be made 'in any Court of competent jurisdiction.' The 6th clause, referring to the decree for partition, speaks of the 'Court,' but the 8th clause, referring to the order for sale which (by clause 2) is decreed when a partition is impossible or inexpedient, ' provides that the Certificate to convey title should be by the 'Judge of such Court', not 'Judge or Commissioner.' The words conferring jurisdiction to Courts of Requests in the Ordinance 11 of 1868, sec. 81, are the same as those in No. 8 of 1859, but a proviso is added to the former excluding certain actions, that of partition not being one of them. But the question arises, is an application (for that is what it properly is) for partition an action in which title to, interest in, or right to possession of, land is necessarily in dispute? These may arise and commonly do, and when they do arise are, as a matter of convenience, disposed of in the same suit. They are not however treated as separate and preliminary issues, until the case is ripe for partition, which has to be decreed and carried out in the way prescribed by the Ordinance. The remedy for joint owners not co-heirs (actio de communi dividendo) and that for co-heirs (actio familiæ exciscundæ), which enable the tribunal awarding the same to take into consideration all equitable circumstances and claims requiring, for instance, one party to make adequate compensation to the other party in money for any inequality as to land, are hardly remedies which can effectively be carried out by a Court of very limited civil jurisdiction; but, whether it can be carried out or not, it is certainly not expressly given to Courts of Requests and cannot be assumed by implication."

Partition suits.

December 8.

Present Morgan, C. J. and Stewart, J.

C. R. Colombo, 102161. This was an action by a seaman against the Captain of the "Queen of the Age" for the recovery of Rs 16.25, "being half-month's advance for the month of Octo-

Merchant Shipping Act.

Merchant Shipping Act.

ber last due by the defendant to the plaintintiff." The defendant pleaded "not indebted" It appeared from the evidence that the plaintiff had signed the usual articles to serve under the defendant who, however, shortly after, before the ship sailed, discharged the plaintiff before the Collector of Customs, on the ground that he had reason to believe the man was of bad character. The Commissioner (*Byrde*) held as follows: "There must have been some good reason for plaintiff being struck off the articles. He himself says that his former master charged him with trying to burn his ship, the 'Alexandra.' Plaintiff is nonsuited with costs."

In appeal (*Browne* for appellant, *Layard* for respondent) per Morgan, C. J.—"Appeal rejected. No appeal lies under the 47th section of the Merchant Shipping Act, 7 of 1863."

December 22.

Present Morgan, C. J. and Stewart, J.

Vendor and purchaser.

C. R. Kandy, 53588. The defendant had sold plaintiff a land, warranting to defend title. Subsequently the right to a portion of the said land being disputed, the plaintiff instituted C. R. case No. 52135, which was referred to the arbitration of Mr. Proctor Pompeus, who decided against the plaintiff. The defendant appeared before the arbitrator and gave evidence in favor of plaintiff. The Commissioner (*Pennycuick*) having dismissed the present claim, which was for the value of so much of the land as the plaintiff had lost in the previous action, the plaintiff appealed.

In appeal, *Grenier*, for appellant. [Morgan, C. J.—Has not the plaintiff lost his remedy by having submitted to arbitration in the first instance?] No, because the defendant had had notice and the plaintiff had acted bonafide. Voet, 21, 2, 21 and 23. *Layard*, for respondent, was heard contra.

Per Morgan, C. J.—"Affirmed, but altered into a nonsuit. Costs divided. The defendant, who sold to the plaintiff the land from which he was evicted in the connected case, appeared as a witness before the arbitrator. He cannot, therefore, be allowed to object to the reference, or to want of notice. But there is no evidence to show the value of the portion from which plaintiff was evicted, excepting his own, which is by far too vague and general to be relied upon."

Commission to appraise.

C. R. Negombo, 22622. Held that where a Commission issued at the instance of the Court, in order to ascertain the value of a land which neither party had represented correctly, the cost thereof should be paid for equally by both parties.

THE APPEAL REPORTS.

1874.

PART III.—DISTRICT COURTS.

January 6.

Present CREASY, C. J., and STEWART, J.

A plaintiff cannot be compelled to file a deed not pleaded in his Libel.

D. C. Negombo, 6423. The plaintiff, (*Stork*) as proprietor of an allotment of land called the Pallanchena Farm, complained of the defendants that they falsely claimed a right of way over the eastern extremity of the said land and unlawfully filled up two portions of the southern and eastern boundary ditches, &c., &c., to plaintiff's damage of Rs 90. The plaintiff further alleged long possession, and pleaded the 3rd clause of the Prescription Ordinance in bar of defendants' claim. The plaintiff, having been noticed by defendants' Proctor to file the title-deed and survey of the land, attended Court, and on being examined by the Judge (*Liesching*) stated, "I claim the land by possession under a deed from private parties in 1844. I claim nothing by prescription over and above what that deed conveys." Whereupon the following order was made: "though plaintiff has not in his libel recited any deed, it is evident that he relies on it; and the Court therefore holds that it should be filed with the libel before the defendants can be called on to answer."

In appeal, per CREASY, C. J.—"Set aside. The Supreme Court does not think that the District Judge had power to compel the filing of this deed. But if the plaintiff, on being told that he ought to file it, refuse to do so, such refusal may be very good ground for rejecting any application to amend his libel which he may find necessary to make at the trial."

Injunction. Security.

D. C. Kalutara, 27682. Plaintiff filed his libel on the 6th October, and moved for an Injunction to restrain the defendants from drawing toddy on a certain land claimed by him and com-

Injunction. Security.

mitting waste by cutting down trees, &c. The motion was allowed by the learned District Judge (*Jayetilike*) without however any order being made as to security. On the 14th October, the defendant obtained a Rule on the plaintiff to shew cause why the Injunction should not be set aside for his default in giving security. On the 27th October, after hearing Counsel, the Court made order as follows: " Mr. Thomasz states that it is not usual to require a party to give security before issuing a writ of injunction to restrain a party from committing waste. If such has been the practice of this Court, the sooner it is abolished the better. I think in every case where an injunction is issued, the party applying for the writ should give security. In the present case, as the plaintiff has failed to give security, the Injunction issued on the 6th instant is set aside."

In appeal, (*Grenier* for respondent) per CREASY, C. J.—" Set aside. If any imperative rule as to requiring security existed, the Judge ought to have made the giving of security a condition of his first order. The plaintiff who took that order generally was in no respect to blame. We consider that the requiring of security, to be given by the party who obtains a writ of injunction, is a matter of discretion only. Cases may occur in which it may be proper to impose such terms. The present decision is to be without prejudice to any application which the defendants may make, within reasonable time and supported by proper affidavit, for discharging the Injunction unless the plaintiff gives security."

February 10.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Sequestration of a Coffee crop and appointment of a Receiver set aside.

Wall & Co. v. *Holloway & Co.*

D. C. Kandy, 60808. The defendants (*Holloway and Co.*) had, on the 5th of June, 1873, agreed to sell to the plaintiffs (*Wall and Co.*) 5,000 bushels of garden parchment Coffee, at the rate of Rs 7 per bushel, to be delivered at Colombo at the following dates:

On or before	31st October, 1873,	1,000	bushels.
,,	30th November,	2,000	,,
,,	31st December,	2,000	,,

As security for the performance of the contract, and for certain advances received by them, the defendants, on the 17th July, 1873, executed a mortgage of certain landed properties, and of their right, title and interest in and to the crop of the season 1873-74,

Sequestration of a Coffee crop and appointment of a Receiver set aside.

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of a certain Coffee Estate called *Esperanza*, situated at Nitre Cave, of which Mr. Theobald was the lessee. The defendants as further security did, on the 2nd of September, 1873, execute a deed whereby they specially transferred, assigned and set over unto the plaintiffs all their right and interest in and to the mortgage and hypothecation, by way of lien, effected by a certain Indenture, dated 4th August, 1873, between the defendants and Theobald. By that Indenture, Theobald sold to the defendants the crop of the Esperanza Estate, estimated at 2,000 bushels, at ₨ 7·50 per bushel, undertaking to deliver the same at Kandy between the date of the agreement and the 28th February, 1874, and binding himself to pay as liquidated damages one rupee on every bushel advanced for. The defendants, on the other hand, agreed to make advances during the above period not exceeding ₨ 5 per bushel of the quantity of Coffee as estimated by themselves. And as security for the fulfilment of his part of the agreement, Theobald specially mortgaged and hypothecated to and with the defendants the entire crop of the said Estate of the season 1873-74, "whatever might be its yield, nothing excepted." The plaintiffs now sued for a breach of contract, in that the defendants had made default in delivering the 2,000 bushels due on the 30th November, to plaintiffs' damage of ₨ 9,120, and moved for sequestration on an affidavit to the effect that the defendants, although they had received a good portion of the Esperanza crop, had not delivered the same to the plaintiffs, and that if the said crop were not immediately sequestered, it would be lost to the plaintiffs, particularly as the defendants had admitted their inability to fulfil their obligations to plaintiffs, and to others under like contracts. The learned District Judge *(Laurie)* allowed the motion, subject to security for ₨ 10,000. Theobald having subsequently moved on an affidavit filed by him, that the sequestration be set aside, the Judge refused to entertain the motion, except on condition that security should be found for the crop. On the 19th of December, the plaintiffs filed two affidavits, (one from the Kandy Fiscal shewing that about 2,220 bushels of Coffee were lying in the Esperanza store requiring immediate curing, and another from Mr. Welsford, in the employ of Messrs. Wall and Co., who swore that the crop on the trees in the said Estate required immediate picking, gathering and pulping), and moved that Mr. John Russell Grant be appointed a Receiver with directions to take charge of the crop of the Esperanza Estate, and to cause the said crops to be picked, gathered, cured and sold to the best advantage; also to make all necessary advances (which should be considered a first charge on the crop), and to render a true account to the Court.

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The motion was allowed, the Receiver giving security for Rs 20,000; and the sequestration of the crop was thereupon removed.

Theobald appealed against the orders of the District Judge, allowing the Sequestration and appointing a Receiver.

The case was argued this day, by *Ferdinands*, for appellant.—The sequestration was irregularly obtained, as plaintiffs' affidavit did not disclose any breach of contract by the appellant, who could not be prejudiced by any act of *Holloway*. If the plaintiffs desired to take the rights of the defendant under the appellant's contract, they should have taken the responsibilities and engagements of the defendant as well, and have made the advances, upon which alone the delivery of the Coffee could be enforced. The transfer of the appellant's crop to the plaintiffs was only by way of securing the defendant's own contract, and all that the plaintiffs would be entitled to would be the proceeds in money of the appellant's crop when realized, and not the Coffee itself; and therefore the sequestration of the crop was illegal. The affidavit on which the Receiver was appointed was equally defective, as it contained no allegation of a breach of contract by appellant, and no averment that the defendant or the plaintiffs had fulfilled their part of the contract in respect of advances. Such an averment would be necessary in any action for a breach of the contract.

The Queen's Advocate, for respondent, urged that the sequestration was regular as the affidavit did allege that a portion of the crop, which should have gone to the plaintiffs under their assignment, had found its way to Messrs. Mackwoods' Stores, and the appellant had not denied, when he had the opportunity of doing so, that he was not aware of this. The assignment to the plaintiffs of the appellant's crop was a complete transfer of the whole crop, and no demand was ever made on the respondents for advances under the appellant's contract, and this should not now be made a pretext for withdrawing from the contract. The Court was right in granting equitable relief by the appointment of a Receiver, by which the rights of all parties would be saved, and future litigation avoided.

Ferdinands, in reply.—The affidavit did not allege that the appellant had sent the coffee to Mackwood, and he should not be made responsible for the acts of the defendant. There is no averment that the appellant had notice of the assignment, and he was justified in sending all his crop to the defendant. The

Receiver materially prejudiced the appellant by damaging his credit, and by causing needless expense; and so far from avoiding litigation, the appointment would necessarily lead to further law-suits.

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Cur. adv. vult.

(*February* 13.) Mr. Justice CAYLEY delivered the finding of the Collective Court to-day in the following judgment, setting aside both the orders of the Court below.

"Both orders set aside. This is an appeal against two orders of the District Court of Kandy; one, sequestering the crops of the 'Esperanza' Coffee Estate, of which the appellant is lessee; and the other, appointing a Receiver of the said crop, with directions to pick, gather, cure and sell the same in parchment by public auction, and also authorizing him to take charge of, cure and sell any Coffee in parchment that may now be found in the stores of the said Estate, and to make any advances necessary for this purpose, such expenditure to be a first charge on the crop. The sequestration was withdrawn on the appointment of the receiver; but, as the propriety of this appointment depends upon the propriety of the sequestration, it is necessary to consider whether the latter was properly or improperly granted.

"The facts of the case are these:—By letter dated 20th May, 1873, the appellant, the lessee, offered to the defendant in the action the crop of the said Estate, estimated at 2000 bushels (more or less) No. 1 parchment Coffee, which was to be delivered at the defendant's store (which is situated at Kandy) on or before the 28th February, 1874, at a certain rate (not named in the letter) per bushel delivered, the defendant advancing to the appellant from time to time, as agreed, at the rate of Rs. 5 per bushel, to be deducted from the value of the Coffee, as delivered. This offer was accepted by the defendant by a letter of the same date, in which the price of the Coffee was fixed at Rs. 7. 50 per bushel. On 5th June, 1873, the plaintiffs, through their brokers Messrs. F. C. Herring & Co., purchased from the defendant 5000 bushels of garden parchment Coffee at the rate of Rs. 7 per bushel, to be delivered at the plaintiffs' Colombo stores in 3 instalments, on or before the 31st December, 1873. On the 17th July, 1873, the above contract of purchase between the plaintiffs and the defendant was embodied in a notarial instrument, in the form of a Bond, with a penalty of Rs.60,000, in which it was recited that the defendant had received from the plaintiffs Rs. 15,000, and that the plaintiffs had agreed to make him further advances to the extent of Rs. 15,000, on the condition that the defendant would supply the plaintiffs with 5000 bushels of good

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garden parchment Coffee, in accordance with the contract entered into, on defendant's behalf, by Messrs. F. C. Herring and Co. The bond was made conditioned for the performance of this contract, and for the payment of certain damages in the event of a short delivery. The Bond also contained a hypothecation of a variety of properties, in which the defendant was interested, and also a hypothecation of all the right, title and interest of the defendant in and to the crop of the said 'Esperanza' Estate of the season 1873-74, to which he was entitled under the letter above referred to of the 20th May, 1873. The agreement of the 20th May, 1873 between the defendant and appellant was subsequently embodied in a Notarial Indenture dated the 4th August, 1873. By this Indenture (which must be regarded as the binding contract now subsisting between the parties), after a recital that the appellant had agreed to sell, and the defendant had agreed to purchase, the crop of the 'Esperanza' Estate of the season 1873-74, estimated at 2,000 bushels, it was covenanted (amongst other things) that all covenants therein contained should bind the heirs, executors and administrators of the party covenanting, and the benefits thereof should accrue to the heirs, executors, administrators, *assigns* or partners (as the case might be) of the other party. The appellant further covenanted to deliver the coffee between the date of the Indenture and the 28th February, 1874, and the defendant covenanted to pay the appellant for every bushel of Coffee so delivered at the rate of Rs 7.50 per bushel, and also to advance to the appellant, between the date of the said Indenture and the 28th February, 1874, certain sums not exceeding Rs 5 per bushel of the quantity of Coffee, as estimated by the defendant. There was also a provision in the Indenture that, if the crops of the season 1873-74, should exceed 2,000 bushels of No. 1 parchment, the excess as well as all the inferior coffee of the Estate should be delivered to the defendant, the latter paying the usual market value for the same. For securing the performance of the covenants entered into by the appellant, the Indenture lastly contained a mortgage and hypothecation in favour of the defendant of the entire crops of the said Estate of the season 1873-74. By a Notarial deed dated the 2nd September, 1873, in which the documents above referred to were recited, the defendant, as further security for the performance of the covenants and conditions of the Bond of the 17th July, 1873, transferred and assigned to the plaintiffs all his right and interest in and to the mortgage and hypothecation, effected by the said Indenture of the 4th August, 1873, over the crop of the said estate of the season 1873-74. On the 28th November, 1873, the defendant wrote to the plaintiffs expressing his inability to carry out his contract with them,

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in consequence of the shortness of crops, and the great rise in the price of coffee, and asking for time to repay the advances made with interest and damages. On the 3rd December, 1873, the plaintiffs instituted the present suit against the defendant for the recovery of the damages sustained by them by reason of the defendant's failure to perform his contract, and on the 5th December applied for and obtained the sequestration of the 'Esperanza' crop, on the ground that the defendant had not delivered to the plaintiffs a large portion of this crop, which he had received, and that, unless the crop were immediately sequestered, it would be lost to the plaintiffs, and that they would be led to new and further litigation. The application for the appointment of the Receiver was supported by an affidavit of Mr. Welsford, in which he stated that he had been informed by one of the partners of Messrs. Mackwood and Co., that the latter had in their stores in Colombo about 120 bushels of "Esperanza" Coffee.

"Now, in dealing with the question of the propriety of the sequestration and the consequent appointment of the Receiver, three points arise for our consideration :—(1) Would the defendant (supposing he had not executed the deeds of the 17th July and the 2nd September, 1873, in favor of the plaintiffs) have had any right to obtain a sequestration of the appellant's crop? (2) If he would have had such right, have the plaintiffs by virtue of the above deeds succeeded to that right? (3) If no such right could have been exercised by the defendant, have the plaintiffs, nevertheless, established any such right in themselves or made out such a case, as would warrant the Court in granting the equitable remedy prayed for?

"With regard to the 1st point, it appears from the affidavit of Mr. Welsford that a considerable portion of the gathered crop from the estate had found its way to Messrs. Mackwood and Co.'s stores in Colombo. If the appellant, without the consent of the defendant, had sent this Coffee to Messrs. Mackwood at Colombo, instead of delivering it at the defendant's store in Kandy, this would no doubt have been a breach of his contract with defendant, and would (we think) have entitled the defendant to a sequestration of the remainder of the crop. But there is nothing to shew that the appellant, in breach of his agreement with the defendant, sent the Coffee to Colombo. When he was examined in Court by defendant's Counsel on the 15th December, 1873, no questions were put to him as to whether or not he had continued up to that time to deliver his Coffee to the defendant according to his contract. And it appears from Mr. Wall's affidavit that

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the defendant had received a large portion of the crop, but had failed to deliver it over to the plaintiffs. So that it would seem that it must have been the defendant who sent the Coffee to Mackwood and Co. If such is the case, no breach whatever of the contract between the appellant and the defendant has been disclosed, such as would have entitled the defendant to obtain a sequestration. The time for the final performance of the contract between the defendant and the appellant has not yet arrived, and, unless some breach had been shewn or some act by which an intention to commit a breach might be clearly inferred, we do not see how the defendant would have had any claim to obtain a sequestration.

"As we think that the defendant himself could not properly have obtained the sequestration, it is unnecessary to consider how far the plaintiffs have succeeded to his position by virtue of the deeds of the 17th July and the 2nd September, 1873.

"We now come to the 3rd point. Have the plaintiffs themselves, independently of any breach of contract between the defendant and the appellant, made out a sufficient case for the equitable remedy which has been granted? The sequestration has not been granted under the Ordinance 15 of 1856. Indeed, the provisions of that enactment are quite inapplicable to the present case. It was applied for at Common Law, on the ground that the plaintiffs are in danger of losing the crop to which they claim to be entitled, and of being led to new and further litigation. It is true that they have a certain interest in the crop, but as mortgagees only of the benefit of a contract to deliver it, entered into by the appellant with the defendant. For, although the contract embodied in the Indenture of the 4th August, 1873, is expressly made assignable, we think that the deed of the 2nd September, 1873, must be regarded, not as an absolute transfer, but as a mortgage only. Now this mortgage does not give the plaintiffs a right to demand from the appellant a delivery of the coffee to them, but only a right, after judgment is obtained against the defendant, to have the benefit of the contract between the appellant and the defendant declared specially bound and executable to satisfy the plaintiff's claim; that is, to have the benefit of this contract sold by the Fiscal, and the proceeds of the sale paid over to them (the plaintiffs). It may indeed be urged that, unless the appointment of the Receiver is confirmed, the plaintiffs run a serious risk of their security being impaired. But this risk necessarily accompanies a security, which consists of the hypothecation of the benefit of a contract of this kind, which

imposes obligations, as well as confers benefits, upon each contracting party. On the other hand, this risk arises from no improper act or default on the part of appellant. He has committed no breach of his contract. He is, according to his affidavit, prepared to carry out his part of the contract, upon the defendant duly performing his part. The sequestration, followed by the appointment of the Receiver, with authority to take charge of the growing crop, and pick, gather, cure and sell the same, would take away from the appellant all present control over the management and expenditure of his estate, and this, for no fault whatever on his part. Although the defendant had power to mortgage with the plaintiffs the benefit of his contract with the appellant, he had no power by such mortgage to prejudice in any way the position of the appellant. If the plaintiffs are in a position to shew that there is good reason for believing that the appellant, in breach of his contract with the defendant, after the proper advances have been made or tendered, or in collusion with the defendant, with the object of depriving the plaintiffs of their security, intends to deliver the crop to third parties instead of the defendant, it will be open to the plaintiffs to apply for an injunction to restrain him from so doing. And the defendant, in the same manner, might be restrained by injunction from disposing of the coffee delivered to him by the appellant, in any manner that would endanger the plaintiffs' security. Or, perhaps, the most effectual course would be to apply for a Receiver (not of this particular crop), but of the defendant's property, with power to the Receiver to carry out the defendant's part of the contract of the 4th August, 1873, and thereby to compel the appellant to carry out his part. By this means, the appellant's position would not in any way be affected, and the Receiver would succeed to the rights and responsibilities of the defendant."

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February 17.

Present CREASY, C. J. STEWART and CAYLEY, J. J.

D. C. Colombo, 62582. The defendant (*Supremanien Chetty*) by his written contract, dated the 24th December, 1872, agreed to deliver to the plaintiffs (*Duncan, Anderson and Co.*), at their Stores in Grand Pass, within thirty days, one thousand cwts of Native coffee, as per sample, picked and dried and ready for shipment, at Rs. 31·25 per cwt, and the defendant further agreed that the cost of picking the said coffee should be paid by himself. The plaintiffs advanced, on account of the said contract, the sum of Rs. 15,000,

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and on the 15th of January received from the defendant 464 cwts, 2 qrs and 20 lbs of unpicked coffee, the out-turn of which, in picked and dried coffee, amounted to 365 cwts, 2 qrs and 4 lbs, of the value of Rs. 1422·99. The cost of picking this quantity, chargeable to the defendant, was Rs. 248·44. No more coffee was delivered within the contract time, and, according to the Libel, the plaintiffs were obliged to go into the market and supply the deficiency, to wit 634 cwts, 1 qr, 24 lbs, at the then current market rate, to wit., Rs. 37 per cwt. The plaintiffs now sued to recover the following sums :

Balance of advance as aforesaid	Rs. 3577·1
Money paid by the plaintiffs on defendant's account for picking...	248·44
Difference in price of the coffee which the defendant failed to deliver and of that which the plaintiffs purchased in the market... ...	3648·17
Total...Rs.	7473·62

The following is an exact copy of the Contract :—

Colombo, 24th December, 1872.

" I the undersigned R. M. M. S. S. Supremanian Chetty do hereby agree to sell to Messrs. Duncan, Anderson & Co., the undermentioned articles,—viz : Cwts. 1000 native Coffee picked and dried ready for shipment. The Coffee to be put in unpicked and picked to the satisfaction of the buyers—picking charges to be borne by me—at Rs. 31.25 per cwt. and I further agree to deliver the articles at Grand-pass Stores as per sample within thirty days from date hereof and receive payment in cash."

The defendant, admitting the contract and the advance as alleged, pleaded a refund to plaintiffs of Rs. 2516·18 and claimed to be paid at the full rate of Rs. 31·25 for the whole of the unpicked coffee which had been delivered by him. He further objected to the picking charges as excessive, and complained that plaintiffs had not accounted to him for the refuse coffee in their hands.

The plaintiffs, in their Replication, reduced the amount of their claim to Rs. 5410·11, by giving the defendant credit for the following items :

By proceeds of cwts 80—1—2, refuse coffee sold by consent of defendant...	Rs. 1474·92
By cash from Messrs. Duncan, Symons and Co. ...	588·59

On these pleadings the parties went to trial on the 10th July, 1873, when plaintiffs' Counsel, having opened the case, called the following evidence :

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William Ronald, sworn.—In December-January last I was in charge of plaintiffs' stores at Grand-pass and superintended the picking, and the out-turn after picking was 365 cwts, 2 qrs, 4 lbs, clean coffee. The charge of Rs. 248-44 cents was paid out by us to the pickers and included no business or commission charge of our own—all paid out, being at the rate 1325 chits at 8¾ cents. That is the usual rate paid in Colombo for this quality of coffee.

Cross-examined.—I have had three years' experience in picking coffee. The percentage of drying and refuse was 18.96 per cent., whereof the refuse was about 14½ per cent. and the dryage about 4½ per cent. I now find that the percentage was not 18.96 but 21.5 per cent. The calculation was wrong: the data accurate—viz. delivered nearly 465 cwts. odd, out-turn 365 cwts:—difference 99 cwts = 21.5 per cent.

John Duncan, sworn.—I am one of the plaintiffs' firm. The market price of native coffee in Colombo rose 12s. to 14s. per cwt above the contract rate between 24th January of this year and 24th December of the previous year. What I have charged is exactly what I actually paid in the market about ten days after the contract should have been fulfilled. I could not get coffee earlier than the ten days nor cheaper, and it was with difficulty I got it then. The price was rising and has risen steadily ever since. I produce the defendant's written consent (A) to our selling the refuse to his account at a limit of 36s per cwt., dated 25th March, 1873, and I sold it accordingly after action commenced. On the 24th January, coffee was unprocurable. We sold the refuse coffee to native dealers. Document B was signed by me and sent to defendant.

The plaintiffs' Counsel put in evidence the written contract and also the document A which was as follows:

Colombo, March 25th, 1873.

J. Duncan, Esquire,

Dear Sir,

I hereby authorise you to sell all my refuse Coffee under my contract No. 156 with Messrs. Duncan, Symons & Co., and under my contract No. 4 with Messrs. Duncan, Anderson & Co., at a price not less than 36s or Rs. 18 per cwt. all round.

I remain,

Your's faithfully

[Signed by defendant.]

The defendant's Counsel addressed the Court and put in document B, which was as follows:

Memorandum. From Duncan, Anderson & Co. Colombo 14th February, 1873.	To R. M. M. S. S Supremanian Chetty.

Take notice that the time of your contract No. 4 of December 24th, 1872 for cwts 1000 native coffee has elapsed and that cwts. 536 of it being now twenty one days overdue, we shall purchase the same at your risk and hold you responsible for the difference and charges.

(Signed) Duncan, Anderson & Co.

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The learned District Judge (*Berwick*) held as follows: "I consider both the language and meaning of the contract to be quite plain, viz. that sufficient unpicked material was to be delivered to yield an out-turn of 1000 cwts coffee picked and dried. Judgment to be entered for the plaintiffs as prayed for in the Replication."

In appeal,—(*Ferdinands*, for the respondents, was not heard)—per Stewart, J.—" Affirmed. The terms of the contract appear to us to be quite clear. The defendant was bound to sell "one thousand cwts Native coffee, picked and dried, ready for shipment:" consequently the delivery of any other substance or coffee not answering this description, would not be in compliance with the contract. The provision for picking was obviously inserted as a check, and to afford the plaintiffs the means of satisfying themselves that coffee only of the kind intended was brought to account. As respects the amount of damages awarded, the evidence establishes that the plaintiffs could not, at any time between breach and action brought, buy for less than the sum charged."

February 20.

Present Creasy, C. J., Stewart and Cayley, J. J.

Master and Servant.
Sleeman v. *Carey.*

D. C. Colombo, 62539. The plaintiffs (*Thomas Sleeman* and his wife, *Sarah Jane Sleeman*) had entered into the following agreement with the defendant (*Laurence St. George Carey*), at Guernsey, on the 5th July, 1872.

This agreement made in the Island of Guernsey, this fifth day of July in the year of our Lord one thousand eight hundred and seventy-two, by and between Laurence Carey, of the Island of Ceylon, Esquire, of the one part, and Thomas Sleeman, late of the Coast Brigade, R. A., but now a Pensioner residing in the said Island of Guernsey, of the other part, witnesseth: that the said Laurence Carey hereby engages to employ the said Thomas Sleeman, in the capacity of Groom and general servant, and Sarah Jane Sleeman, wife of the said Thomas Sleeman, in the capacity of Cook and general domestic servant, for the term of 3 years to reckon from the 1st day of August, 1872. And the said Thomas Sleeman hereby engages that he and his said wife shall faithfully serve the said Laurence Carey in such capacities for the said term.

2. The said Laurence Carey shall pay the said Thomas Sleeman and wife's passage money from England to the said Island of Ceylon.

3. That from and after the arrival at Ceylon of the said Thomas Sleeman and wife, the said Laurence Carey shall provide them with board and lodging during the residue of the said term.

4. In consideration of the services of the said Thomas Sleeman and wife in the aforesaid capacities, he the said Laurence Carey shall pay unto the said Thomas Sleeman an annual sum of £75 sterling, representing £50 for the services of the said Thomas Sleeman and £25 for those of the said Sarah

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Jane Sleeman, the said sum of £75 payable half-yearly from the 1st day of August, 1872.

5. And it is finally agreed by and between the said parties to these presents, that if the conduct of the said Thomas Sleeman and Sarah Jane Sleeman, his wife, during the said term of 3 years, shall have been such as to give satisfaction to the said Laurence Carey, and the said Thomas Sleeman and wife shall be desirous of quitting Ceylon at the expiration of the said term, he, the said Laurence Carey, shall pay the passage money for the return of the said Thomas Sleeman and wife to England.

In witness whereof the said parties have hereunto set their hands, at Guernsey aforesaid, (where stamps are not used) on the day and year first above-written.

(Signed) Laurence St. G. Carey.
" Thomas Sleeman.

The Libel alleged that, in pursuance of this agreement, the plaintiffs had accompanied the defendant to Ceylon and had entered his service on or about the 5th August, 1872, but that on the 20th December, 1872, the defendant had, without reasonable cause, dismissed the plaintiffs from his service to their damage of Rupees 2658·75, which included their wages for the unexpired period of the contract and their return passage money.

The defendant pleaded that he had been induced to engage the plaintiffs by reason of their having misrepresented to him that they were qualified to discharge the duties of groom and general servant and cook, respectively; that the plaintiffs had thereafter proved themselves unfit to act in his service; and that the defendant had suffered damage to the extent of Rupees 100, being the depreciation in value of his horse which had been injured by the misconduct and negligence of *Sleeman*. The Answer concluded with the prayer that plaintiff's claim might be dismissed and that they might be condemned to pay in reconvention the sum of Rupees 960, being the amount of damage as aforesaid and "the value of second-class passage moneys paid by the defendant for the passage of the plaintiff and his wife from Guernsey to Ceylon and for moneys paid by the plaintiff for the defendant at his request."

On the issues thus raised, the parties proceeded to trial. The defendant, in his evidence, stated—

"Mrs. Sleeman was not dismissed for fault. She was very slovenly and very lazy, but I only dismissed her because I dismissed her husband. I did not give her the option of staying after I dismissed the husband."

At the close of the defendant's case, the plaintiffs' Counsel withdrew the claim of the passage-money and salary of the husband, contested the claim in reconvention, and insisted on damages for the wrongful dismissal of the wife.

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The learned District Judge (*Berwick*) held as follows : "As plaintiff's Counsel has withdrawn the claim for wrongous dismissal of the husband, it is only necessary to adjudicate on that part of the claim in the Libel which is founded in the alleged wrongous dismissal of his wife. From the manner in which the contract is described in the Libel, it is evidently there intended to appear that the defendant contracted with the wife as well as with the husband, and that she was a party to the agreement ; but the written contract, which is in evidence, speaks for itself. On referring to it, it appears that Thomas Sleeman alone engaged with the defendant that he and his wife should serve him for 3 years, the former in the capacity of groom and general servant, and the latter in the capacity of cook and general domestic servant, in consideration of which services Mr. Carey agreed to pay to Thomas Sleeman an annual sum of £75. It is added that this sum *represents* £50 for the services of the husband and £25 for those of his wife ; but it is clear that the defendant's contract was solely with the husband, and that his obligation was to pay the husband solely the whole sum of £75. The right construction of and law applicable to the document therefore is that, if Thomas Sleeman should so conduct himself as to justify the defendant in putting an end to the contract, he might put an end to it *entirely*, and would be free of his engagement to pay the husband any part of the £75 and free of his engagement to retain in his service the husband AND his wife. The evidence admittedly has shewn that Sleeman proved himself useless and either incompetent or neglectful in the particular service for which he had engaged himself, and neglectful of his master's instructions in a particular instance which occasioned the latter considerable loss in the value of a horse ; and that defendant was quite justified in putting an end to the contract,—that is to say to the whole contract made to and with his groom, including the engagement to take the services of his wife as a domestic servant and to pay the husband for her services. It follows that Sleeman not being entitled to damages for dismissal of himself from his service as defendant's servant, is not entitled to damages for the dismissal of his wife from the service which he associated with his own. In a word, he having broken his contract to the defendant, the defendant is justly free from the whole of his contract to him, including that part of it which bound defendant to retain and to pay him for the services of his wife and to pay him the whole or any part of £75 a year. Further, it is plain that the engagement of his wife's services was only accessory to the

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engagement of the husband's services, and an accessory engagement necessarily falls when the principal engagement falls. The whole claim in the Libel must therefore be dismissed. This judgment in no way depends on the technical questions as to whether the right parties have been joined in either the contract or in the Libel, or as to the validity of the contract itself, which were taken by the defendant's Counsel. In a case of this kind, I have thought it desirable (as I stated at the trial) to confine ourselves to the substantial law and merits of the servant's claim. I have now to deal with the claim in reconvention. I think the defendant is entitled to recover in reconvention the loss sustained by the damage to the horse, which has been very moderately laid at Rs. 100. With respect to the defendant's claim for refund of the plaintiff's and his wife's passage money to Ceylon expended by him, there has been no express contract by the plaintiff to refund this expenditure under any circumstances, nor am I clear that there was any implied contract to do so. I do not think that it was money paid by the defendant for the *use of* and at the *request of the plaintiff* as alleged in the pleadings, but on the contrary that it was money paid by the master in the ordinary way of travelling expenses of himself and domestics, and therefore for his own use; and that consequently there was no implied contract on the servant's part to refund it on any contingency. If recoverable at all, it can only be either as damages *naturally resulting* from some specific act of omission or commission subsequent to the commencement of the service, which it certainly was not, or be included in damages for breach of an implied warrant of reasonable competency and skill in the work plaintiff engaged himself for; but the claim to the refund in question is not based in the pleadings on this latter ground. Defendant will be nonsuited as to this portion of his claim in reconvention, and will have judgment for the remainder of his claim, namely for Rupees 100 and costs of suit."

In appeal, Grenier, for appellants, contended that the indenture sued upon contained two distinct and separate contracts with husband and wife, and that the defendant's breach of agreement with the latter could not be justified by the misconduct, if any, of the husband.

Browne, for respondent, was not called upon.

Per Cayley, J.—" Affirmed. We think that the construction put upon the contract by the learned District Judge is correct. The contract clearly contemplates the joint service of

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the husband and wife; and there is no provision for the one remaining in the service of the defendant, after the service of the other is determined. The plaintiff agrees that he and his wife shall faithfully serve the defendant for three years: and in consideration of the services of the plaintiff and his wife, the defendant agrees to pay to the plaintiff the sum of seventy-five pounds (£75) per annum, representing £50 for the service of the husband, and £25 for that of the wife. The contract lastly provides that, if the plaintiff and his wife shall give satisfaction to the defendant during the three years, and the plaintiff and his wife shall be desirous of quitting Ceylon, the defendant shall pay their passage money to England. The contract is clearly one entered into with the plaintiff for the joint service of himself and his wife: and as the plaintiff has been justifiably dismissed, he cannot recover damages for the consequent dismissal of his wife."

Coffee Estate Agents. *Gow* v. *Lee, Hedges & Co.*

D. C. Colombo, 62810. This was a case of disputed accounts between the plaintiffs (*Niel Gow* and *William Maxwell Gow*) and their agents (*Messrs. Lee, Hedges & Co.*) in respect of the management by the latter of a Coffee estate called Forest Creek, situated at Dimbula and belonging to the plaintiffs. The following judgment of the District Judge (*Berwick*) fully explains the items on which issue was joined.

Both parties allege errors in the accounts rendered to the plaintiffs and desire to have them rectified. Issue was taken summarily at the trial on the new points raised by the replication, and evidence received on all the points in dispute. I deal with these separately, in the order in which they appear in the pleadings.

I. *Item of Rs.* 700: *commission of one per cent, on guaranteeing a loan to plaintiffs by Bowring of Rs.* 70,000. This charge must be disallowed. Plaintiffs being indebted to the defendants in a sum exceeding Rs. 70,000, secured by a primary mortgage on Forest Creek, and being unable to pay the same, that amount was borrowed from Bowring for the purpose of being paid to defendants, who, in consideration of being thus paid, agreed to relinquish in favour of Bowring their primary mortgage for the balance due to them and also became security for repayment of the Rs. 70,000 and joined the plaintiffs accordingly in executing the mortgage:—the plaintiffs on their part giving up the control and management of the estate and crops (including the curing and general mercantile business derivable from it) to the defendants, until the debt should be discharged. Defendants seek to justify the charge of a commission on Bowring's loan (the proceeds of which went to themselves) on the ground that it is a charge "allowed by the usage and custom of *Merchants*, inasmuch as "they guaranteed the said loan by joining the plaintiffs as a

"joint and several debtor to the said Samuel Bowring for the plain- "tiffs' benefit." It seems to me that the transaction was for the defendants' own interest in more ways than one, and that they would have been very unlikely to have become surety (unless as friends) for so large a sum as Rs. 70,000 unless they had anticipated a much greater benefit than a mere bonus of £70. However this may be, it is a charge which cannot be supported except by a contract, express or implied, to pay it. There was clearly no express contract to pay it in this case: and with respect to the endeavour to shew an implied contract by reference to a schedule of certain general rates of agency and commission charges agreed to among the members of the Colombo Chamber of Commerce,—assuming that this was a purely mercantile contract, and assuming that there is evidence (which, however, I think there is not) of such a mercantile usage to charge constituents a commission of this nature, and that plaintiff is such a person as would be bound thereby,—the evidence of the chairman of the Chamber of Commerce clearly shews that no invariable usage in that respect exists here which would apply to the particular circumstances of this case. (Question by the Court) " Is it the invariable habit of Estate Agents to charge a commission of one per cent. upon a sum, repayment of which they guarantee, when that sum has been applied in satisfaction of their own claims?" (Answer by the Chairman) " *There is no invariable practice*, and to answer the question I would have to give my own opinion as to what might or generally would be considered *fair* on the transaction itself." Obviously, the opinion of any witness, as to what *he* would think fair cannot influence the Court in determining legal liabilities, nor can it establish the existence of a local mercantile usage having the force of law, and thus available to annex to a contract, by implication, an incident or liability not expressly agreed upon. The letter of 19th July, 1871, addressed by defendants to plaintiffs (Lr. H.) was put in, to show a tacit acquiescence in this charge, but it is plain that the passage relied on had reference not to this but to a commission on the negociation of certain bills of exchange, possibly those by which this money was drawn for, and certainly not to a commission for becoming securities in the bond. *That* may be a very questionable charge in a case of this kind, but it is not the charge in question which is not supported by any evidence of either express or implied agreement to pay it, nor by any subsequent acquiescence.

II. *Seedlings and young plants.*—I only deal with those which the Superintendent in defendants' employ, and for whose acts defendants are responsible, sold to himself: though I must observe that the free and cheap way in which he appears to have parted with others to his neighbours and the loose accounts he kept of them, is far from creditable to a person who knew that the estate was being worked at the time by a creditor on behalf of an indebted proprietor.

There is an absolute concurrence of testimony (Messrs Ryan, Walters, Elphinstone, Buchanan, for plaintiffs; Messrs. Sinclair, W. Smith, Robertson and Knight for defendants) that the young plants were

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worth from 10s. to 12s. per 1,000, and seedling 1s. to 1s 6d. Stumps would be worth rather more than young plants. Though such transactions are often done in perfect innocence, yet it cannot be too widely known that a sale to oneself by a person in the position of another's agent is odious to the law, and that in all cases of doubt as to quantity, quality and value, every thing is to be presumed against the seller-purchaser. In the present instance this gentleman, Mr. George Smith, kept no account of the quantity or description (whether seedlings or plants) which he took from Forest Creek to plant up his own estates of Abercairnie and Maha Ellia, and can only now give an estimate by a calculation of the acreage so planted. He credited the proprietor with plants for Abercairnie £30 ; seedlings, £2 10s. ; 19,000 stumps to Maha Ellia £2 17s ; total £35 7s.

I am satisfied that these sums are very much underrated. He admits that he put 50,000 seedlings into his nurseries, *and that he planted the rest* out at once. He so planted about 100 acres of Abercairnie, which would require 150,000 of an age at which what was so planted have ceased to be "seedlings" and have become what are technically known as "plants." That they were actually plants, and not mere seedlings, is proved by several distinct circumstances. They are called "plants," in his own account filed with defendants' answer. They could not be planted out direct unless they were of that maturity ; "seedlings" being only fit for nurseries. He debits himself at a rate which comes to 4s. per 1,000, which is utterly inexplicable if they were only seedlings, for Mr. Sinclair and every other witness in this case has proved that 1s. to 1s. 6d. is the outside price at which seedlings have been sold : he was not likely, therefore, to charge himself such an absurd price as 4s. unless they were better than "seedlings." Mr. Sinclair proves that in March 1869, these so called "seedlings," growing under the trees all over the estate, were more than a year old. But his having planted them directly out into the fields is conclusive proof of their maturity. Probably the 50,000 seedlings he put into his nurseries were intended to supply vacancies only ; and I conclude that the estate of Abercairnie was planted up with "plants." The account must then be taken thus :—

			£	s.	d.
50,000 "Seedlings"	at 1s. 6d.	....	£ 3	15	0
150,000 "Plants"	at 10s.	...........,	,, 75	0	0
19,000 "Stumps"	at 12s.	...........,	,, 11	8	0
			90	3	0
And as there has been credited only			35	7	0
The difference..................................			£54	16	0

must be allowed to plaintiffs and the defendants are liable for this to them, with recourse (probably) against their Superintendent.

III. *Clearing ravines*, £88 9s. 4d. As the acreage of the ravines by survey does not exceed seven, this would be at the rate of between

£12 and £13 an acre, or even if there were 9 acres, as Mr. Sinclair estimated by eye, the rate would be nearly £10. The answer is that this included the cost of taking up the seedlings (and young plants ?) the Superintendent not having kept the matters separate. It is admitted that the estimate for the seedlings was £30 and for the ravines £30; total combined £60; and the actual excess of nearly £30 on the combined amount is attributed by the Superintendent to his having drained and planted a swamp, and to the ravines and seedlings having cost more than was expected.

Where labour has been honestly though not very profitably expended, the disposition should be to pass the Superintendent's charge, even if there should have been error of judgment in matters of minor detail, or if there be not much to show for the expense. As I was anxious to give effect to this principle as far as possible, it is with reluctance that I have resolved to make no allowance whatever for pulling up seedlings beyond the small sum to be presently mentioned. The Superintendent (Mr. George Smith) himself admits that it is usual for this work to be done by the weeding contractor under his weeding contract, and Messrs. Walters and Elphinstone have deposed to the same effect,—excepting (Mr. Elphinstone adds) when they are purposely left in the ground for use in new clearings.

There is therefore a clear *onus* on the defendants to shew special reasons for a special charge; and this they have not done. On the contrary, if any were purposely left in the ground for the purpose of sale, in point of fact no expense was incurred in taking them up. Not certainly in respect to those sold to Messrs. Banner, Robertson and Scott, who removed them for themselves, and were allowed the run of tracts of 47 acres and so on for the purpose, (see the evidence of G. Smith and J. Robertson); and accordingly, the dates in the account filed with the answer shew payments by these gentlemen anterior to the dates of the items for weeding ravines or pulling seedlings in 1871, with one inconsiderable exception of a charge of £4 12s. 6d. for this work in April. The only expenditure incurred therefore on account of seedlings or plants sold in 1871 must have been in regard to those sold to the Superintendent himself for Abercairnie. Now Mr. Knight has proved that a fair charge for pulling up these is 4½d. per 1000; and as there were taken for Abercairnie and Maha Ellia 150,000 plus 50,000 plus 19,000=219,000, the expenditure thereon at 4½d. comes to only £3 17s. 6d.

I can therefore only allow this sum plus the £4 12s. 6d. in April; total £7 10s; which deducted from £88 9s. 4d. leaves £80 19s. 4d, say £81, for clearing 7 acres of ravines and swamps; or £11 11s. 5d. per acre, a rate which the whole evidence shows to have been quite preposterous and the complaint of it is perfectly just. The work could not or should not have cost at the outside more than £3 an acre, which would be less than the estimate which was made on the erroneous assumption of there being 9 instead of only 7 acres. I shall only pass the charge to the extent of £3 an acre, with an extra

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allowance of £10 for planting the swamp next Rosita, total £31 which deducted from £81, leaves £50 to be credited to plaintiffs. I do not think this can be an over surcharge, or that the alleged labour was expended; and at all events the defendants must bear the consequences of any doubts that are created by their Superintendent having improperly jumbled up the special expenditure on clearing ravines with the seedling account. In truth I think the Superintendent's account filed with the answer a very unsatisfactory document altogether.

IV. *Presents to Coolies*, £13 15s. 8d. viz:—

For Perunals, October 1870	£ 5	0	0
„ December 1871	„ 5	1	8
„ Presents to children	„ 0	19	6
„ Coats to Canganies, Jan. and April 1871	„ 2	14	6
	£13	15	8

There is no question that the giving these gratuities on estates is common, but the question here is whether they form a fair and proper charge against an unwilling proprietor; and the evidence shews great variety both of individual practice and of opinion as to the general practice with respect to charging them in the estate accounts. Possibly, most proprietors who manage their own estates may consider them as personal expenditure and do not enter them in the estate accounts; while on the other hand probably, Superintendents, being merely almoners of their employers' generosity, do charge them in their accounts, and they may not be then generally objected to. It seems to me to be one of those many matters in which a reasonable discretion must be allowed to the party in immediate control of an estate, and that his discretion must be exercised in this way:—If the presents are prompted by mere personal liberality, he has no right to be generous with other people's money; and especially when the estate is being worked by a creditor, he is bound to strait thrift and a strict accounting. If, on the other hand, the expenditure is or reasonably may be for the direct benefit of the estate, and not from mere liberality—as where a gratuity has become a mere name for additional wages established by the practice of the district,—he will be justified in making it. As the tendency of so objectionable a form of habitual remuneration is to grow into a customary right which a manager could not resist without risking the labour on the estate, it must, within reasonable limits, be left to his individual judgment to decide whether this condition of matters has arisen; but he should be able to shew some colour of probability for this if the question comes into Court and the sum be of moment; and I think the Courts ought not to lean to a systematic fiction which has so objectionable a tendency and is open to great abuse by persons acting for absent proprietors, though they (the Courts) will look fairly to the *bona fides* of payments actually made. Where they flow from mere gratuitous liberality the Court cannot sanction such charges at all. In this instance I do not

think the probability above mentioned sufficiently established to take it altogether out of the general rule of that strict accounting which is required from a creditor—mortgagee in possession :—that it must therefore in such a case as this be left to the proprietor's good taste whether he will resist a not strictly legal though a common charge ; and that, standing on their legal rights as the plaintiffs do, the item must be surcharged or reduced to the lowest limits. I shall adopt the latter course here. The labour force was about 200. Mr. Sinclair thinks from £5 to £7 a year reasonable for such a force. Mr. William Smith says 6d. a cooly and the name entered in the day's check roll. Mr. Ryan, about £3, Mr. Walters, £2 to £3. Mr. Elphinstone gives £7 for 400 men. I will allow £3 for each of the years 1870 and 1871, and consequently surcharge £7 15s. 8d. The particular item is small but the principle to be decided is of some practical importance, and indeed large accounts are generally made up of small items.

V. *The Superintendent's salary for June* 1872. I think the defendants were entitled to charge this sum which they actually paid. Mr. Smith was entitled to a clear month's notice free of a broken period, and the only question is whether it was the defendants' fault that due notice was not given the Superintendent that his services on the estate would be discontinued. The precise date of the notice given to him is not in evidence, but he states that he left on 24th May and was paid up to the 30th June (1872, I presume). It is true that by letter of 6th September, 1871, defendants gave plaintiffs notice to pay up their claims within 6 months, which period expired on 6th March 1872 (Lr. L.) ; but it was not to be expected that they should make and complete the details and arrangements for quitting possession of the property until they had an assurance and certain prospect that their debt would be paid at the end of that period ; and certainly matters were not brought to this point even in May, which was 3 months after the above term (see letters of 11th May and 2nd July, 1872.) If they had given notice to their Superintendent, and he had left the estate accordingly before the plaintiffs were in a position to enable defendants to relinquish it, both parties would have been seriously prejudiced for want of a Superintendent agreeable to the mortgagee. It was therefore not the fault of the defendants (so far at least as the evidence before me shows) that the Superintendent was not given the earlier notice to which he was entitled, and the plaintiffs' own letter of 11th May, 1872, shews this to have been their own view at that date.

VI. *Blacks, Browns and Pieces,*

VII. *Deficiency of out-turn of crop.*

The first of these items forms the refuse remaining on curing Coffee which of late years has acquired a marketable value, and in fact forms a considerable proportion of what is sold as Coffee in the poorer bazaars and is also shipped abroad. The other item involves a charge that the defendants credited the plaintiffs with a less weight in cwts. of Coffee than fairly corresponded with the quantity in bushels which was despatched from the estate, and depends on the

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probable proportion of "light" Coffee. It was agreed that both these points, including a question as to "estate-cleaned Coffee" should be decided by the opinion of the witness Mr. Wickwar, who has had special experience on this subject and to whom the requisite accounts and papers were handed by the parties for this purpose. He has given his opinion together with the details in the annexed document marked W, shewing a total sum of £105 9s. 9d. as omitted to be credited to plaintiffs, but which he considers them entitled to. The plaintiffs will be credited with this amount accordingly.

VIII. *Rosita Crop.*

According to the evidence of Mr. Grant, the defendants' representative in Kandy, the defendants purchased the Rosita crop of 1869-70 for themselves (not for the benefit of Forest Creek) but cured it with the Forest Creek machinery. Mr. Ballantyne, the then Superintendent under the defendants, received payment for this work by a cheque from Mr. Grant, dated 29th June, 1870. He ought to have credited this to Forest Creek, but it does not appear that this has ever been done. It is not perfectly clear whether Mr. Ballantyne had not been dismissed by the defendants a few days before Mr. Grant gave him the cheque, but this, if it be the fact, would not affect their liability to make good the amount. If it was paid to him before his dismissal, being a receipt on account of Forest Creek it was their duty to see that it was credited to that estate, and they are accountable for it as much as for any other estate earnings. If they paid it to Mr. Ballantyne after he was dismissed, they have yet to pay it to the proprietors of the estate. Plaintiffs will have credit for this, which we may take at the amount of Mr. Grant's cheque, viz. £9 17s. 5d.

IX. *Claim in reconvention.*

This is a cross claim by defendants for an alleged omission in their accounts of half of the one per cent. commission due to them for negociating bills—only ½ instead of one per cent. being charged, and the difference amounting to £64 2s. An explanation has been given on the other side. I am not quite satisfied in respect to this matter by what has been advanced on either side, and the claim will therefore be reserved from the present judgment. The point can be well referred to arbitration, or, if parties do not agree on this and wish a judgment in the present suit, it can be set down for further hearing and decision on the point.

Plaintiffs recover, and judgment will be entered for them for, the following sums:—

I.	Overcharge of Commission on guaranteeing loan from Bowring ... ...Rs.	700.00
II.	Omission on account of seedlings and plants sold	548·00
III.	Overcharge for clearing ravines and pulling seedlings	500·00
IV.	Overcharge for presents to Coolies	77·83

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VI.	Omission on account of " blacks, browns and pieces" ... ... }	
VII.	Ditto. of light coffee and Estate-cleaned coffee ... ... }	1,054 83
VIII.	Omission on account of the Rosita crop ...	17.86
	Total, together with costs of suit, for which judgment is to be entered ... ... Rs.	2,979·37,

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In appeal, the case was argued by *Ferdinands,* for appellants, and *Kelly,* for respondents, entirely on the facts as disclosed in the evidence.

PER CREASY, C. J.—" Affirmed. We think that the reasons given by the learned District Judge, for the manner in which he has dealt with the various disputed items of account, are substantially correct. We do not think that the judgment need stand over on account of the claim in reconvention. It has been admitted in argument that all the evidence available on that subject is already before the Court. It appears that the plaintiff was to pay one per cent. on bills negotiated in London. Defendant has charged the moiety of this one per cent. in his own accounts, and Price and Boustead have in their accounts charged the other moiety. See document N and the annexed accounts of the London firm."

February 17.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Insolvency.

D. C. Colombo, 927. In this case protection to an insolvent was withdrawn, on the ground that he had kept no books. The order of the learned District Judge (*Berwick*) was as follows: " The insolvent is quite unable (or unwilling) to give any account whatever of his dealings in trade. The Court has long since determined that a person who is a trader, however large or however small his trade may be, who seeks as such the benefit of the Insolvency Ordinance, is not entitled to such benefit, unless he has acted fairly with the public *on* which he trades, by keeping such books as will disclose his dealings with his creditors, when they are losers by his dealings, and when he comes into the Insolvency Court for special protection against them. If a man cannot keep any sort of books or accounts to show his transactions, he has no right to trade, at least not to the public disadvantage; nor has he a right to the same privileges against the public and

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same benefits under the Insolvency Ordinance as other traders; and the observation applies with equal force however humble and insignificant the trader may be. Acting under the 9th paragraph of section 151 of the Ordinance, further protection is refused pending the allowance or disallowance of a certificate."

In appeal, (*Grenier* for appellant, *Browne* for respondent) per Stewart J., affirmed.

Criminal jurisdiction.

D. C. Negombo, 236. This was a criminal charge of "shooting at and wounding the complainant." It appeared that the defendant had loaded his gun with an over-charge of shot and slug, and had discharged it at the prosecutor, who was lying at the time on a cot inside his house; that a flattened bullet, of the size of a pistol bullet, and several grains of shot had been found lodged in the door post; and that Dr. Misso had subsequently extracted a grain of shot, which looked like No. 6 shot, from the complainant's right thigh. The accused was represented by Counsel at the trial and duly pleaded not guilty to the indictment. The District Judge (*Lieschíng*), however, found him guilty and sentenced him to 12 months' hard labour in the following terms: "It is evident that an excessive charge of lead was contained in the gun, and to this cause it is not improbable that the defendant owes the fact that he is this day on his trial for the minor offence, instead of awaiting his trial for murder before the Supreme Court."

In appeal, on the point of jurisdiction, the judgment of the Court below was affirmed.

February 24.

Present Creasy, C. J., and Stewart and Cayley, J. J.

Deed of gift, revocable.

D. C. Badulla, 19360. The plaintiff claimed an undivided half-share of certain premises, under a bill of sale dated 26th February, 1872, which had been executed in his favor by Meybrink, the husband of the second defendant, to whom the property had been gifted in 1862 by his mother-in-law, the first defendant. The action was for damages and for a decree of title as against both the defendants who, it was alleged, had disputed plaintiff's right under the conveyance by Meybrink. The 1st defendant admitted her gift to Meybrink and his wife (the 2nd defendant), but pleaded (1) that the lands in question had been given for their

Deed of gift, revocable.

support and maintenance ; and (2) that after the marriage, Meybrink having ill-treated and deserted his wife and ill-used the 1st defendant, the latter had thereupon resumed possession of the property. The Replication contained a general denial of the allegations in the Answer, save as to admissions ; and the case went to trial on the issue as to whether the deed of gift was revocable or not. The material portions of the deed, which was a notarial document, were as follow :

"That Henrietta Tissera (2nd defendant) having been married to Mr. John Meybrink, I the said donor (1st defendant) give and heridate them the undermentioned lands,houses,etc., as a final gift with my good will and pleasure. All the lands, houses and fruit trees valued at £200 in consideration of the foregoing circumstances have been as a final gift given to the said Mrs. and Mr. Meybrink. Therefore after this, I, the donor, my heirs, descendants and administrators from generation to generation can neither claim nor make any dispute in respect of the said lands,houses, etc. From this day the said Mrs. Meybrink and Mr. Meybrink, their heirs and descendants are authorized to hold and possess the said lands and houses in any manner they like and do as they like with the same. I have before this done no act whatsoever against this gift-grant. Further, should any dispute arise in respect hereof, I and my heirs bind ourselves to interfere and settle the same."

The District Judge (*Gibson*) held as follows :

"The facts of the case are these. At the end of 1861 or early in 1862, John Meybrink married 2nd defendant, the daughter of the first defendant who shortly after the solemnization, on the 13th March, 1862, granted a deed of gift to Meybrink and his wife, when she transferred to them jointly the specified ¼ of Antalawe, a room in the house standing thereon, and a piece of ground, 30 feet long and 12 feet in breadth, adjoining the said house. John Meybrink and 2nd defendant continued to live together as man and wife, partly in Badulla and partly in Antalawagedere, till 2nd defendant was about to be confined, when Meybrink took her to her parent's house, where she appears to have lived ever since; and it would appear from the evidence that after she gave birth to the child, Meybrink gave up visiting her altogether. In December 1863, one Mr. Stouter put Meybrink in Court to recover from him a certain sum for goods sold and delivered, and obtained judgment ; writs were issued and ½ of the ¼ of Antalawe, which had been given by 1st defendant to him and 2nd defendant, was sequestered, and not sold on account of 1st defendant opposing it ;—in consequence of this Meybrink got angry with 1st defendant and her children, and committed an assault upon them, for which he was tried before the Hon'ble the Supreme Court at Kandy, was convicted, and sentenced to corporal punishment and to imprisonment for a term of two or three years. On his being discharged from gaol, he went

Deed of gift, revocable.

to retake possession of the land, but his possession was opposed by defendants. Subsequently, on 26th April, 1872, he transferred the said land to plaintiff, who goes to take possession of it, but is also prevented from so doing by defendants, and in consequence thereof, he, on the 22nd August, 1872, brought the present action. * * * The Court is of opinion that it is implied in the deed of gift that Meybrink should support and maintain his wife, and it is very clear from the authority cited by defendants' counsel (Armour page 91) that if the donee fails to comply with any condition, whether such failure arise either from poverty, or, as in this, originally from his wilful neglect, and subsequently on his having been deprived of his liberty, the deed becomes null and void. Gross ingratitude, misbehaviour and violence to donor have also been proved against Meybrink, which also annul the deed. The Court considers that of itself the deed became null when Meybrink so grossly misbehaved himself in assaulting first defendant and her children, and that there was no ground to have the deed revoked by a Court of law. On these grounds it is considered that Meybrink's transfer to plaintiff was illegal, as by his misconduct he had forfeited his right to the lands."

In appeal, Ferdinands, for appellant. The deed being a formal gift of only a portion of the donor's estate was not revocable. Austin, p. 43. It was besides unconditional, and, being burdened with a warranty clause, was intended to be absolute and *final*, as expressly recited therein. The deed, moreover, had not been altered or annulled by any notarial instrument, and hence the legal title at the date of the conveyance to plaintiff was in his vendor. Austin, p. 159.

Ondaatje, for respondent. Meybrink having failed to fulfill the implied condition in the deed that he would maintain and support his wife, the gift became null and void. Armour p. 91. Further, the donor here had resumed possession in consequence of the donee's ill-usage, and no deed of revocation was necessary. Armour, p. 92. Solomons, p. 25.

Per CAYLEY, J.—" Affirmed. This deed of gift, which was not granted in consideration of marriage, and contains no clause barring the grantor from resumption of the property, appears to us to be revocable under Kandyan Law, and not to come within the class of irrevocable deeds given by Armour. The resumption of the land by the donor in consequence of ill usage from the donee, (both of which are fully proved) is sufficient by Kandian Law to render the gift null and void. See Armour p. 90. We do not agree with the judgment of Mr. Justice Carr reported in Austin, p. 159."

March 3.

Present Creasy, C. J., and Stewart, J.

D. C. Matara, 15567. Judgment had been entered in this suit on the 23rd August, 1849, and execution levied in 1856 at the instance of the widow and executrix of the original plaintiff, who had died in 1850. The case was allowed to lie dormant till May 1873 when, on the widow applying for leave to draw the amount of the judgment, the District Judge (*Swettenham*) held as follows:— "No step has been taken in this case since 1856. The Court holds that the judgment must be deemed to have been satisfied, following Ordinance 22 of 1871, section 5. To hold that this clause only affects judgments passed since January 1872 would be to delay the operation of the Ordinance for 10 years." Loan Board Ordinance.

In appeal, per Stewart, J.—"Set aside with costs and remanded for the District Court to proceed in the mode prescribed by the 2nd paragraph of the 18th section of the Ordinance 4 of 1865. The 5th clause of the Prescription Ordinance 22 of 1871 is inapplicable. There is no attempt here to enforce execution or to revive judgment. The money in question having been recovered in due course, when the judgment was in operation, and a third of a century not having elapsed since the deposit, the amount is still available for the benefit of the plaintiff's representatives."

April 2.

Present Cayley, J.

D. C. Matara, 7932. This was an appeal against a conviction for receiving a stolen bullock with guilty knowledge. Two persons charged as the actual thieves were acquitted, and the only evidence against the appellant was his recent possession of the stolen animal, which, according to the judgment, he failed to prove, as alleged, that he had purchased from the 3rd defendant. Receiving stolen property.

In appeal, Grenier for appellant. There was no evidence of any person having stolen the bullock, and the mere fact of possession was insufficient to support a charge of *receiving*. R. v. Densley, 6 C. and P, 399.

Per Cayley, J.—"Set aside and judgment of acquittal entered. The appellant has been convicted of unlawfully receiving stolen property. Much of the evidence adduced by the complainant appears from the judgment of the learned District Judge to be

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untrustworthy; but he considered that the appellant's guilt might be legitimately deduced from his possession of the complainant's property, unless he could satisfactorily shew that he was innocently in possession; and the learned Judge is of opinion that the appellant has failed to prove that he purchased the animals in question from the 3rd defendant. But the presumption arising from the possession of stolen property is that the possessor stole the property, not that he received it; and in the present case the appellant has been acquitted on the charge of theft. Upon an information against a person for receiving stolen goods, there must be some evidence to show that the goods were in fact stolen by some other person, and evidence of recent possession of the stolen property is not alone sufficient to support the charge. (See Russell on Crimes, II, p. 555. 4th edition). In this case, the persons who were charged as the thieves were acquitted, and there is no evidence that any other person stole the animals. The evidence generally in the case is very unsatisfactory; and, though the part of it which the learned District Judge believes to be true would have supported a conviction on the first count, it is not sufficient to establish the charge of receiving."

April 13.

Present CREASY, C. J.

Appeal on facts. Costs.

D. C. Colombo, 1515. In this case three defendants, who were charged with cattle-stealing, were acquitted, and the complainant was cast in costs, on the ground that the prosecution was false and frivolous.

In appeal, (*Ferdinands* for appellant, *Grenier* for respondent) per CREASY, C. J.—" Affirmed, so far as regards the judgment of not-guilty. Set aside so far as regards the order that the complainant shall pay the defendants' costs. The complainant had abundant reason for charging the defendants. Indeed the case appears, on reading the evidence, to have been fully proved. But as we did not see the demeanour of the witnesses, we abstain from the strong measure of reversing the judgment of the learned judge who did see and hear them."

May 26.

Present CAYLEY, J.

Cattle stealing. *Furtum.*

D. C. Batticaloa, 1657. The defendants in this case were found guilty of cattle-stealing. It appeared that the complainant's cattle having trespassed at night on the defendant's land

and eaten their seed-paddy, the defendants seized the animals, but instead of keeping them properly impounded, used them the next morning in "trampling" their field. The District Judge (*Worthington*) convicted the defendants, on the ground that they were guilty of such fraudulent conversion, as bailees, as amounted to theft.

Cattle stealing. *Furtum.*

In appeal, Grenier for appellant. To prove *furtum* it must clearly be shewn that the *contrectatio* was *fraudulenta, cum animo furandi.* This was entirely negatived by the evidence.

Per CAYLEY, J.—" Set aside and the prisoners severally adjudged not guilty. I am of opinion that the conviction cannot stand, and that the complainant's remedy must be by civil action. It is true that fraudulent conversion by bailees is, in many cases, punishable under the Dutch Law of *furtum* ; but in this case the prisoners were not bailees. There was no express or implied contract of bailment between the parties, nor were the cattle taken by the prisoners with the consent of the owner, express or implied. The Dutch Law of *furtum* is, no doubt, of very wide application, and includes a great number of acts of dishonesty, which could not be brought under the crime of larceny, as understood in English law ; and there are many cases, in which the wrongful user of property may be held to be *furtum,* although the original acquisition of possession was perfectly lawful. See the instances of *furtum* given in Voet (Comment. Lib ; 41. Tit. 2. §§ 5. and 6). But in all cases of this kind, to constitute criminality there must be a fraudulent intent ; the *contrectatio* must be *fraudulosa* or *animo furandi.* (See the three definitions of theft given by Damhouder in his Praxis Rerum Crim. p. 185.) Now in the present case the circumstances, so far from disclosing, seem to me to negative, such intent or animus. There was no concealment whatever about the use of the cattle; they were only employed in the field, and as soon as the Udayar came and spoke to the 1st accused, he at once explained how he came to be using them. The prisoners seem to have acted under a mistaken notion of right, and not with any intent to defraud."

June 2.

Present STEWART and CAYLEY, J. J.

D. C. Galle, 35001. The plaintiff sued the defendant on a promissory note which the latter had granted to one Sithamberam Chetty, who had endorsed the same to plaintiff. The defendant pleaded—(1) that he was not indebted; (2) that he was not

Demurrer.

Demurrer. liable to pay the amount claimed; and (3) that the promissory note was not duly stamped. On the plaintiff demurring to this answer, the District Judge (Roosmale Cocq) held :—" The Court is of opinion that the answer must be taken in its *entirety*, and in that view the demurrer might be held good. Demurrer upheld with costs."

In appeal, (*Ferdinands* for respondent) per CAYLEY, J.—" Affirmed, with liberty to the defendant to file an amended answer on payment of all the costs arising out of the demurrer, and of this appeal, within seven days of the case being sent back to the Court below. The Rules of Practice (p. 158) are clear that every answer shall admit or deny or confess and avoid all the material facts alleged by the plaintiff, and shall clearly and concisely state and set forth the same. The present answer is altogether deficient in this respect."

Insolvency. *D. C. Galle*, 19. The insolvent in this case was refused a certificate by the District Judge (*Roosmale Cocq*) in the following terms : " The Court is of opinion that inasmuch as the Insolvent has not conformed to the provisions of the Ordinance, viz., (1) in not giving or producing to the assignee his accounts that he says he kept by books, (2) in concealing the fact of his right to $\frac{1}{2}$ of certain lands (which it is clear he has a right to by the mortgage bond in case 35482) and pretending that he has a right to only $\frac{1}{4}$ now, the insolvent is not entitled to any certificate. His certificate is therefore refused."

In appeal, per CAYLEY, J.—" Set aside and case sent back for further enquiry and consideration. Under the 147th clause of the Insolvency Ordinance, an insolvent, who on the day appointed for his examination does not deliver up to the Court the books relating to his estate, is made liable to transportation for life ; but it could not have been the intention of the Ordinance to make so highly criminal mere neglect on the part of the Insolvent, without any wilful contumacy or fraudulent concealment. It will be observed that the 31st clause only requires the insolvent to deliver upon oath his books, if thereto required by the Court ; and we think that the 147th clause should be read in connexion with this section. There is no evidence in the present case that the insolvent was directed by the Court to deliver up his books ; and we think that his mere neglect to do so (though a sufficient circumstance to be taken into consideration against him, and a good reason for the more closely scrutinizing his books), should not in itself be deemed a sufficient reason for the entire disallowance of the certificate, especially as he offered at the examination to go home and fetch his books, and has since delivered them. With regard to the

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second charge, that the insolvent stated he was entitled to ¼ only of a certain land, whereas sometime previously he had mortgaged 1-7th of the same land, some further enquiry is necessary. It is possible that in point of fact he may have been entitled to ¼ only, notwithstanding the previous mortgage; but there may have been some mistake about the mortgage; and the deed, if necessary, should be produced, and the mortgage examined, before it is assumed that the act was of such a fraudulent character as to disentitle the insolvent to his certificate."

Proctor's Costs.

D. C. Kandy, 36580. On the 19th November, 1873, Mr. R. J. Smith filed proxy of Appa Etana, widow of Pallegedara Ukkurala deceased, the defendant in the above suit, and of Dingiri Appoo and Punchi Etana, his children, and moved for a rule on 1st plaintiff (the 2nd being dead) to show cause why the writ issued in this case should not be extended and re-issued, or fresh writs should not issue to recover costs of suit. On the rule being allowed and duly served, first plaintiff had cause to show, producing a duly stamped receipt from the above-named Dingiry Appoo, proved (as to signature) by D. C. Silva, notary public. The District Judge (*Lawrie*) thereupon discharged the rule, "reserving all rights which Mr. Smith, Proctor for defendants, may have either against the representatives of his late client or against the plaintiff."

In appeal, (*Ferdinands* for appellant, *Grenier* for respondent) per CAYLEY, J.—" Set aside and Rule of 19th November made absolute. There is nothing to show that Dingiri Appoo had any legal authority to receive the amount due on the writ for costs. If the defendant, after the death of the plaintiff, wished to protect himself, he should have paid the money to the Fiscal. Possibly the object, and certainly the result, of this underhand payment was to prevent the deceased plaintiff's proctor from recovering his own costs out of the money. We do not think that the fact of Dingiri Appoo (who had concealed the payment) joining in the application for a rule should deprive the appellants of their remedy and still less the appellant's proctor of his; especially as there is nothing to show that the appellants authorised or ratified or even knew of this payment. This order is to be without prejudice to any right that the defendant may have, after the proctor's claim is satisfied, to draw the share of the money which would be due to Dingiri Appoo."

June 5.

Present Stewart and Cayley, J. J.

Assignment of Judgment (*Lex Anastasiana.*)

D. C. Galle, 32460. In this case Clarke, Spence and Company had obtained judgment against defendant in October, 1872, for Rs 500 and interest on a debt bond, and had recovered only Rs 55 71. About a year afterwards they assigned the judgment to one Pedris for a consideration of Rs 400. The assignee now moved that he be substituted as plaintiff, and that the defendants be ruled to show cause why writs should not issue for the recovery of the amount still due on the judgment. The District Judge having made the rule absolute after argument, the defendant appealed.

In appeal, the defendant urged in his petition (1) " that as the assignee admitted that he purchased this judgment, for Rs 400, because the appellant had done him a ' great injury', the whole proceeding was vexatious, and the Court below should not have been used as an instrument in revenging the injury done; (2) that the amount sought to be recovered was nearly treble the value of what the assignee paid; and (3) that the assignee could only recover in law the amount he bona-fide paid to his assignors, which was only Rs 400 and interest at nine per cent from the date of his assignment and costs, and no more. 3 Burge, 549."

Per Stewart, J.—" Affirmed. The litigation in respect of the right of the plaintiffs having terminated by the judgment in their favor, the present claim is one about which there could be no dispute. Consequently the cession of that judgment cannot be deemed a sale of a litigious claim, such as would come within the operation of the Lex Anastasiana. Pothier on Sale, sec. 591-592. It is unnecessary therefore for the purposes of this case to determine whether that portion of the civil law formed part of the law of the United Provinces of Holland, and also whether that law is in force in this country. It may further be observed that the case before us does not present itself as a claim to the customary *jus extractus* mentioned by Vanderkeessel, thesis 663, and Groenewegen de Leg. abr. cod. 4; tit 35 cl: 22 and 23, so that it is not necessary to consider how far this jus prevails."

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Contempt.

D. C. Kurunegala, 19495. The appellant had intervened in this suit in support of defendant's title to certain temple lands. Judgment was delivered on the 16th March, 1875, in favour of plaintiff, intervenient's case being dismissed, and the defendant

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being noticed to show cause why he should not be punished for contempt in having made false statements in his examination as a party. The defendant having kept out of the way, the intervenient who was in attendance at a Police trial on the 21st April, and whose presence in Court was noticed by the District Judge, was called upon to give bail to appear on a future day to answer to a similar charge of contempt in respect of his examination as a party intervenient, the Judge remarking at the same time (according to the petition of appeal) that the appellant's punishment would in a measure depend on whether he produced the absent defendant or not. On the 6th May, the appellant, who was present without the defendant, was convicted of contempt and sentenced to two months' imprisonment.

In appeal, (*Ferdinands* and *Grenier* for appellant), per STEWART, J.—" Set aside. The Rule No. 29 of the Rules and Orders authorises the punishment of a party for contempt forthwith after the commission of the offence; but it appears to us that this rule does not contemplate that a party should be liable to be brought up after the lapse of so considerable a period as that which has taken place in his case."

Landlord's tacit hypothec.

D. C. Colombo, 62875. The plaintiff, as judgment creditor in this case, caused a writ of execution to issue on the 15th July, 1873. The Fiscal accordingly seized on the 2nd August certain shop goods which had been specially mortgaged to plaintiff by deed of 17th July, 1872, and sold the same on the 30th August, and on the 1st, 2nd, 3rd, and 4th September, 1873, in the very house they were seized. The appellant two days after the said seizure obtained judgment against the execution debtor for house rent in case No. 63123, and lodged his writ with the Fiscal before the sale commenced. The return to plaintiff's writ, which was made on the 19th September, reported the fact that the landlord had claimed priority over the proceeds of the sale in respect of the rent due to him. The plaintiff having obtained a rule on the appellant to try the question of preference, the learned District Judge *(Berwick)* held as follows : " The landlord clearly lost his lien over the *invecta et illata* by allowing them to be sold and removed under plaintiff's writ before he made any claim of lien. The sale was on the 30th August, and, 1st, 2nd, 3rd, and 4th September. The Fiscal, as far as his returns shew, had no notice of the lien till 19th September, and then it was not a claim of lien that was made, but a claim of *proceeds of a levy.* No

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lien attaches over the proceeds sale of the thing that is subject to a lien, unless the sale be in breach of a claim of lien. A lien must not be confounded with a mortgage. It gives no title, nothing but a *bare right* of *detention* of the *ipsa corpora* of the subject of it. The detention gone, the lien is gone. It is now said that though the returns of the Fiscal show the claim, such as it was, to have been on the 19th September, that in point of fact it was made before the sale; and an affidavit and a letter of the Fiscal to the claimant's Proctor are put in to show this. These documents however prove that the claim was not one of detention of the goods, but to a preference over the proceeds sale in execution, which is different from, and inconsistent with, a detention or lien, the English of which word is, "you shant move these good till you pay my rent." Rule made absolute with costs."

In appeal, Fredinands for appellant, relied on the Fiscal's letter of the 12th March, 1874, in which he distinctly admitted that the property sold had been under seizure upon both plaintiff's and claimant's writs. The Fiscal in the same letter went on to explain—" the goods having been advertised for sale under the first mentioned writ, the same were sold subject to the claim of the holder of the writ No. 63123; and his claim for preference over the proceeds sale having been stated as for house rent, the same was reported for the disposal of the Court."

Grenier, for respondent.—The landlord in order to secure and perfect his lien must judicially seize and detain the property—Voet, 20, 2, 3; but there was neither seizure nor detention in this case. The goods, according to the Fiscal's return of the 19th September, 1873, had been sold only under plaintiff's writ, and the landlord had merely claimed out of the proceeds. The Fiscal's letter of the 12th March, 1874, was clearly an after thought and contradicted his previous return to the Court.

Per Cayley, J.—" A landlord has more than a lien over, or right to retain physical possession of the invecta et illata until his rent is paid; he has a tacit hypothec which when perfected by seizure becomes privileged and is entitled to preference over all unprivileged claims whether secured by hypothec or not. See No. 811. D. C. Colombo, Vanderstraaten's Reports, page 103, and the authorities there cited. The principal question in this case is whether there was such a seizure by the landlord as would perfect his inchoate right before the goods were sold under the plaintiff's writ. At the time the claimant's writ was issued to the Fiscal the goods were under seizure by virtue of the plaintiff's writ, but had not been sold; the claimant's writ having

been issued on the 26th August, 1873, whereas the sale of the goods did not commence until the 30th August, and was not completed until the 4th September. Now as the goods were in the hands of the Fiscal at the time, we think that his receipt of the claimant's writ was a sufficient seizure to give operation to the tacit hypothec; for it is clear from the Fiscal's letter of the 12th March, 1874, that he recognised the issue of the claimant's writ to him as a seizure. The question then arises whether the claimant relinquished his hypothec by consenting to the sale of the goods; for, unless he had waived it, there was nothing to prevent his coming forward to put in his claim to the proceeds of the judicial sale in the same manner as other hypothecary creditors. But there is nothing to show that he waived this right to preference; on the contrary, the Fiscal in his letter above referred to, expressly states that the goods which were under seizure upon both writs were sold subject to the claim of the landlord; or, as it would appear from the last paragraph of the letter, subject to his claim for preference over the proceeds of the sale. It was stated by respondent's counsel that he was prepared to show by evidence that the claimant's debt was fictitious, and his judgment collusive and fraudulent, had it not been that the learned District Judge had held in his favour upon the point of law; and we accordingly think that the respondent should have an opportunity of showing this if he can."

Landlord's tacit hypothec.

June 9.

Present Stewart and Cayley, J. J.

D. C. Galle, 34458. The defendant having instituted case No. 34427 caused certain goods to be sequestered as belonging to his debtor, but which goods the plaintiff now claimed as his own, laying damages against the defendant for the alleged trespass at Rs 2,000. The defence was that the property belonged to the defendant in 34427, and as such had been legally sequestered. The learned District Judge (*Rosemalecocq*) in a lengthy judgment held as follows: "There being no reasonable and probable cause, as already shown, to justify defendant's seizure of the goods in question, it remains to be seen what damages plaintiff is entitled to." * * "taking all the circumstances of the case into consideration, the Court is of opinion that plaintiff is entitled to a sum of Rs 100 as damages."

Wrongful seizure in execution.

In appeal, (*Grenier* for appellant, *Ferdinands* for respon-

Wrongful seizure in execution.

dent) per STEWART, J.—"Affirmed. In the present case, the defendant under the writ of sequestration against the goods of Popan Dass wrongfully seized the goods of the plaintiff. The case is one of trespass, and the question of reasonable and probable cause or malice is not material."

Arbitration.

D. C. Jaffna, 11457. This case had been referred by consent of parties to the arbitration of three persons, two of whom subsequently gave their award in favour of the defendants and respondents, the third arbitrator reserving his judgment until he could examine plaintiff's witnesses who were not then ready. The District Judge on the 9th April, 1874, remanded the case to the Arbitrators for the hearing of plaintiff's evidence, and further ordered, with the consent of parties "that in case of any difference of any opinion among the arbitrators the decision of the majority of them shall be considered as their award, and the same be made a rule of Court without further notice to the parties. The award to be filed on or before the 30th proximo." On the 6th May, plaintiff filed a motion praying, on the ground of partiality on the part of two of the arbitrators "that the case be taken out of the hands of the present arbitrators and the same be decided either by the Court or by a fresh set of arbitrators." This motion was disallowed with costs, the Judge (*de Saram*) holding that as the case had with the consent of parties been remanded to the same arbitrators, the Court must adhere to the order already made.

In appeal per STEWART, J.—"Affirmed; and the time within which the award is to be filed is hereby extended to three weeks from the notice of the judgment in appeal to the parties and arbitrators."

Interest.

D. C. Colombo, 62845. The plaintiff sued to recover a balance sum of Rs. 135, with interest at the rate of 12 per cent. per mensem from the 26th December, 1868, on the following promissory note granted to him by the defendant.

Colombo, 26th December, 1868.

I promise to pay to Sabapathy Chetty (plff.) the total amount of £15 being amount with costs and interest in case No. 48591 of Dec. 3, 1867, by monthly instalments at £1 10 per mensem, commencing from the 15th January, 1869. Should any instalments being delayed the following instalments to be paid together.

The plaintiff alleged that the defendant had paid the first in-

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stalment of Rs. 15 when it fell due, but when in default in respect of the following instalments, the plaintiff had consented to give defendant time on condition that he should pay interest, which condition, it was stated, the defendant had agreed to. The defendant, on the other hand, maintained that after the first instalment was paid, the plaintiff went to India, and no demand was made till the present action was instituted.

The learned District Judge (*Berwick*) held as follows:—Where a plaintiff has not chosen to enforce the penalty provided by a promissory note for delay in paying any of the instalments, viz., immediate liability to pay the whole balance, he thereby simply waives the penalty and cannot of his own accord introduce a new penalty, viz., interest. To introduce the right of interest, there should be evidence that the waiver and giving of further time were on a new condition by the debtor to pay interest. No such agreement has been alleged in the libel, and it has not been even there alleged that the instalments were demanded when they fell due; and *non constat*; but that it was plaintiff's own choice to wait and take payment of the whole in full. In such a case, the "certain day" (to use the language of Reg: 18 of 1823) on which the whole debt became due was the date when the last instalment became due, viz., 1st October, 1869, provided that the defendant was then put *in mora* (to use the language of the Civil law) by the note being duly presented for payment and dishonoured. The debt is only *in mora* from the date of presentment or other form of demand, which in this case only appears to be the issue of the summons.

Reference has been made to the English Law, and Byles on Bills (10th Edition p. 303) has been quoted. He says "where interest is not expressly made payable by the terms of the instruments, it runs from the *maturity* of the bill or note," but he gives no authority for his selection of the word *maturity* as distinguished from *presentment* and *dishonor*, which according to my previous impression would have been the more exact term. But further up, on the same page, he has shewn that it is always discretionary with the Jury whether, in such a case, they will give or withhold interest, and this even since the Act of 3 and 4 Will: IV. c. 42 and 28. It is therefore recoverable under that Act, but a plaintiff is not entitled to it as of right. With reference to the conflict of testimony in this case, I disbelieve the plaintiff's statement as to sundry agreements to give the debtor time on his promising to pay interest; and I entirely believe the testimony of defendant that no demand was ever made on him from the date of his paying the first instalment at the one date (namely five

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years ago), till the service of the summons in June last. By plaintiff's own admission he has been out of the country from some time in 1869 until recently. I hold therefore that defendants should be adjudged to pay the interest accruing from the service of summons. As no notice of action or other demand was given before filing the libel, and defendant only defended the suit as to interest and succeeds on this point, plaintiff will pay the defendant's costs, and the plaintiff will have judgment for Rs. 135 as admitted in the answer, with interest thereon from the service of summons till payment at 9 per cent. per annum."

In appeal (*Browne* for appellant, *Ferdinands* for respondent) per CAYLEY, J.—" Affirmed with costs, with the modification that plaintiff is entitled to his costs in the District Court up to the time of filing answer.

Lunacy. Right of appeal.

D. C. Colombo, 819. On the application of a Police Serjeant, a person alleged to be insane was produced before the Court on the 15th May, 1874, when the District Judge made the following order for his remand under the Ordinance No. 1 of 1873.

" The alleged insane on being asked his name and village remains mute. The officers who bring him up have no evidence to shew that his silence proceeds from insanity nor does the man's demeanour necessarily betoken this. He may be remanded under the Ordinance for medical examination for eight days."

On the 22nd May, Mr. Loftus (Assistant Colonel Surgeon) deposed to the insanity of the patient, but the District Judge ordered his discharge in the following terms :

"The Judge examines the alleged lunatic who gives his name as Ganagodagay Cornelis of Cotahena and he gives no indication of insanity. The prosecutor, Ahmid Doll, states that no attempt has been made to ascertain who his friends are or to communicate with them, and he has no evidence of any violence committed by him except when treated as a prisoner in goal. The alleged lunatic is discharged "

Against this order Mr. Loftus appealed ; and in forwarding his petition to the Supreme Court, the District Judge took the liberty of expressing his doubts as to the right of the appellant to appeal, as he had merely been examined as a witness by the Court and had given no certificate accompanying any application under sections 5 and 6 of the Ordinance.

Per CAYLEY, J.—" Set aside and case sent back for the District Court to cause the alleged lunatic to be again brought before it, in order that the case may receive further inquiry and consideration. We think that a medical officer under whose observation an alleged lunatic has been placed for the purpose of ascertain-

Lunacy. Right of appeal.

ing his state of mind, and who afterwards deposes to such state of mind in Court, has under the 15th clause of the Ordinance No. 1 of 1873 a sufficient *locus standi* in the case to entitle him to appeal. That clause evidently contemplates the 'testifying' to the state of mind of an alleged lunatic as something different from 'certifying' or giving the medical certificate mentioned in the 5th clause. With regard to the merits of the case, we cannot say that the learned District Judge was wrong in deciding upon the materials before him that the alleged lunatic ought to be dischaged; but it appears from the petition of appeal, which is signed by Mr. Loftus, the responsible Public Officer, and to which accordingly we feel bound to attach some weight, that the impression made on the mind of the learned District Judge with reference to rather an important point of Mr. Loftus' evidence was not what the witness intended to convey. It also appears from the petition of appeal that Mr. Loftus holds a very decided opinion as to the alleged lunatic's insanity, and also thinks that he was on the verge of a lucid interval when examined by the District Court. He also considers that the lunatic's remaining at large will be attended with danger both to himself and the public. Under these circumstances we think that there should be an opportunity for some further inquiry before the alleged lunatic is altogether discharged."

Attestation of Deeds.

D. C. Negombo, 5742. The question in this case was whether plaintiff, who held a registered mortgage executed in 1870, of a certain land with possession in lieu of interest, was entitled to priority over the defendant, who relied on a mortgage bond of 1864 from the same mortgagor, but which bond, or rather a copy of it (the original having been lost) the defendant had registered subsequently to plaintiff's registration. The acting District Judge (*Dawson*) having found for plaintiff, the defendant appealed.

The Queen's Advocate, for appellant. The plaintiff's bond was legally insufficient, the attestation clause being as follows:

I the undersigned Kuruculasuria Gunetileka Jusa Cura Samerasinhe of Tudella, Notary Public of the District of Colombo, in the Island of Ceylon, do hereby certify that after the foregoing deed was written, read over and explained unto the parties who are acquainted with me, they have set their signatures to three of the same tonor and date as this, and I the said Notary Public have set my seal and signature on the aforesaid day, month and year at my résidence.

Which I attest,
(Signed) J. C. Samerasinhe,
Notary Public.

Attestation of Deeds.

The Notary's attestation did not contain the names and residences of the witnesses, as required by Ordinance 16 of 1852, clause 21, sections 6, 7, and 10, and consequently the bond was void under clause 2 of Ordinance 7 of 1840.

Ferdinands, for respondent. The omission referred to by his learned friend did not render the bond invalid, as expressly enacted in the proviso attached to the end of clause 21 of Ordinance 16 of 1852.

The Queen's Advocate, in reply, relied altogether on the Ordinance 7 of 1840, which required the execution of all deeds affecting immoveable property to be *duly attested*, before the same could be of force or avail in law. The due attestation of such deeds, whether prescribed prior to or later than 1840 should be strictly adhered to, so as to meet the requirements of the local Ordinance of Frauds, the language of which, as rendering any deed not "duly attested" of no effect, was definite and in no sense equivocal.

Per CAYLEY, J.—Affirmed.

June 12.

Present STEWART and CAYLEY, J. J.

Will. Forgery.

D. C. Colombo, 3787.—The question in this case was whether the Will propounded as that of one Sinne Lebbe Sesma Lebbe, deceased, was genuine or not. The learned District Judge, after a protracted trial, having declared the document to be a forgery, the applicant for probate appealed.

Kelly, (*Ferdinands* with him) for appellant, argued at great length on the evidence, and pressed for a rehearing on the ground that he was able to prove that the provisions in the Will were reasonable and not iniquitous as held in the Court below.

Grenier, (*Layard* with him) for respondent, replied on the facts and opposed the motion for a further trial. The appellant had had ample opportunity of adducing evidence in the District Court; and, even assuming that the general provisions in the Will were unobjectionable, the main object of the forgery was to establish a partnership between the alleged testator and his brothers, of whom appellant was one, such partnership being expressly recited in the impeached document.

Per CAYLEY, J.—"We agree with the learned District Judge in thinking that the Will propounded is forged. The circumstances of its discovery and production are in many respects highly suspicious; and a comparison of the signature to the Will

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with the admitted signature of the deceased to the series of cheques produced appears to us to place the matter beyond any reasonable doubt. It was unlikely, to begin with, that the deceased man, who appears to have been a trader in considerable business, and who was in the habit of employing a highly respectable Notary and Proctor (Mr. Joseph) in his ordinary business, should in so important a matter as the execution of his last Will have adopted the less usual mode of attestation by five witnesses instead of the more usual and far safer course of notarial execution. There is a rather remarkable clause in the document, which shews that the writer of the Will (whoever he was) was fully aware of the advantage of a Notarial instrument. 'In case,' he says, 'I be unable to get a Notary to write in respect to all matters, you all shall accept as hereinbefore mentioned and carry them out.' Now there was no haste about the execution of the Will, and the deceased would have had no difficulty in procuring Mr. Joseph, the Notary ordinarily employed by him, or some other Notary, to prepare and attest the document. He could as easily have sent for a Notary as for his clerk, for the house in which he died and his place of business where the clerk would be found are in different parts of the town and at some distance from each other. On the other hand, the clause is one very likely to be introduced by a forger, who felt it necessary to account for the absence of the usual notarial attestation. Again, it is unlikely that the deceased, who had been pressed by his brother, the applicant, four or five days before his death to have some document drawn up should have kept the execution of the Will entirely secret from his brothers, who were to assume the management of his estate and business, and should have left this Will to be accidentally discovered after his death under his pillow. At least we should have expected some explanation of this secrecy ; and there is none. The applicant states that, four or five days before the death, he said to the deceased 'let some document be drawn up,' referring to a Will, and that deceased put him off by saying that he was not unwell, and that it could be done at some future time. Now, the alleged Will is dated the 30th September, and the deceased died on the 4th October, so that the above conversation must have taken place just about the time, or at most a day or two previously to the time, of the execution of the alleged Will, and yet the Will was never mentioned to the applicant. On the contrary, the applicant left the death-bed to go and fetch Mr. Joseph to prepare a Will, although the impeached Will, if the evidence is to be believed,

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was at the time under the dying man's pillow. It is difficult to understand this reticence on the part of the deceased; but still more difficult (on the hypothesis that the Will is genuine) to understand the reticence of the persons who were (if the evidence is to be believed) aware of the execution of the alleged Will. According to the evidence, the widow knew of the Will; the clerk employed in the deceased man's business and necessarily in daily intercourse with the applicant knew of it; and five neighbours (two being relations of the deceased) knew that a document had been signed and attested by six witnesses, though they pretended not to know that it was a Will; but as no other document requires such attestation, they could not possibly have thought it anything else. How, then, was it that applicant, who had shown such anxiety to prevent an intestacy that he had pressed the deceased to make a Will, and had even quitted his brother's death-bed to fetch a Notary for the purpose, (the widow being at the time in the house) should have been left in perfect ignorance of the Will already executed. Again, equally remarkable is the reticence which was observed after the Testator's death, and which the learned District Judge has so forcibly commented upon. The alleged Will is said to have been found and read within an hour or an hour and a half after the death, and yet it was not mentioned at the funeral, not even to the third witness, who was regarded by the deceased almost as a father. One of the witnesses to the Will, who was in the house and continually in and out of the room about the time when it was discovered under the dead man's pillow, never heard of it till the next day; and yet this alleged discovery (which must have created considerable interest and curiosity) was said to have been made in the presence of a number of persons; none of whom, by the way, except the witnesses to the Will, have been called. The widow states that two or three days before the death of the deceased, he told her that 'such a document was executed.' It appears that she understood that the document was a Will; for she goes on to say 'this is the first time I have told any one that my husband had told me he had made a Will." Some days after the death, the widow's father came to see her, and stayed three days in her house. How was it that she never told her father that her deceased husband had told her about the 'document.' Again, she admits that the applicant told her, eight or ten days after the death, that her husband had executed a Last Will, and she goes on to say that her father came and saw her after the applicant had told her about the Will, and that she told her father. How can the father's conduct in going after

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this to Kandy to take proceedings as in the case of an Intestacy be reconciled with this evidence. The only person to explain it is the father himself; and he is not forthcoming. He subsequently entered a caveat against the Will in the Colombo Court, which he, for some unexplained reason, withdrew. The learned District Judge thinks that his opposition was bought off. The fact of his disappearance during these proceedings, coupled with the fact that he is a practitioner of the District Court in which they were carried on, lends much weight to the learned District Judge's conjecture. Suspicious as the above circumstances are, we should nevertheless have hesitated to declare against the will in opposition to the mass of direct evidence in its favor, if the case rested here. But it does not. The comparison of the handwriting of the signature to the Will with that of the signature to the cheques confirms our suspicions. On this point, we have nothing to add to the remarks of the learned District Judge which appear to us to evince great discernment and sagacity. The signatures speak for themselves. That appended to the Will seems to us to display all the characteristics of a fairly clever imitation. The traces of carefulness and deliberation betray the anxiety of the copyist. The salient features are well imitated; the nicer and less noticeable shades and touches are overlooked. The general resemblance is good and such as might deceive a cursory inspection, such as a bank clerk might be expected to give before cashing a customer's cheque; but it cannot stand the test of the close scrutiny, with the aid of a magnifying glass, to which it has been subjected. It was strongly urged by the appellant's Counsel that a Court ought not to allow a mass of direct and positive evidence, given under the sanction of oath or affirmation, to be overthrown by mere inferences drawn from circumstances, and from a comparison of handwriting which, it was contended, is in any case but a fallacious test. It is, however, the painful experience of every Judge in this Island that the oral testimony of native witnesses, although apparently consistent and disinterested, is too frequently itself but a fallacious test of truth; and we are of opinion that where there are surrounding circumstances by which the truth of such evidence can be tested, it ought to stand such test before reliance should be implicitly placed upon it. In the present case, the evidence for the Will has not been able to stand this test. The result is that the learned District Judge, who heard it, disbelieved it, and we disbelieve it. The appellant's Counsel pressed rather urgently a motion for sending the case back to the District Court for a further hearing, in order to ascertain

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the truth of the statements in the petition of appeal with reference to the position of the deceased man's estate at the time of his death, with the object of shewing that the Will was not iniquitous as found by the District Judge. We feel bound to refuse this application. In the first place there is no further allegation that this evidence was not procurable before the trial, and in the next place, neither did the learned District Judge base his judgement nor do we base ours on the dispositions contained in the Will itself. It is perfectly clear that, whether the Will be iniquitous or not, the applicant and his brothers had a strong interest in upholding it. They allege a partnership with the deceased, but they had no deed, and all the business cheques were drawn by the deceased in his own name. The Will commences by reciting this partnership, a valuable piece of evidence in case of any dispute about it. Under the Will, the business is to be carried on as before by the surviving brothers, who are also made Executors and residuary Devisees and Legatees. These provisions were manifestly to the advantage of the brothers, if they desired to continue carrying on the business without interruption or interference. For in the case of an Intestacy under the Mohammedan law, the brothers of the deceased would take nothing. The conspiracy may have been a bold one ; but in all probability, as the children were minors and the widow under the influence of the brothers, it was anticipated that no opposition would be made to the proof of the Will or that all opposition would be as easily suppressed as that of Cuppe Tamby, the widow's father. The order of the Court below is accordingly affirmed with costs."

June 16.

Present Stewart and Cayley, J. J.

Judgment against a married woman.

D. C. Mannar, 6774. The plaintiff in this suit had obtained judgment in case No. 6682, D. C. Mannar, and had caused the Fiscal to seize certain lands which the defendant now claimed. The object of the present action was to set aside that claim. The execution debtors in the case No. 6682 were husband and wife, the present defendant being the father of the latter. It was contended by the execution creditor (present plaintiff) that the property seized by him was the common property of the parents of his debtor, Estranapulle (the wife), and that as she was the only child of her parents and there never having been any division of the common property, the share which she had inherited from her

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deceased mother was liable to be declared bound and executable. For the defendant it was contended (1) that the judgment in case No. 6682 was null and void, as it had been obtained against the wife alone; (2) that Estranapulle and her husband had already received their share of the common estate in jewels and in money given to the husband in advancement of his trade; and (3) that the lands under seizure were the sole property of the defendant.

The District Judge (*Allanson Bailey*) held as follows: "The Court considers it has been satisfactorily proved that the land seized were the common property of the defendant and his deceased wife. No attempt has been made to rebut the evidence adduced on this point. It has not been shown that Estranapulle has received her full share of the estate of her parents. Some jewels appear to have been given to her on her marriage, but it is not clear what their value was. She herself swears that they were only worth £4 to £5. There is some slight evidence that her husband received money in advancement of his trade, but the amount has not been stated, and it appears that he and the defendant were, for sometime at any rate, partners in trade. There remains the first plea of the defendant, viz., that the judgment against his daughter is null and void; and this is the point on which most stress has been laid. There is no doubt that generally a married woman cannot sue or be sued alone, and that a sentence passed against a married woman who has appeared without her husband is of no force and effect and cannot be enforced against her; but, as has been pointed out by the plaintiff's Proctor, there are circumstances in the present case which render it a peculiar one. The bond upon which the judgment in case No. 6682 was obtained was signed by both husband and wife. The wife was allowed in it to specially bind her own property. The husband was made a defendant in the case, and every effort appears to have been made to serve the summons upon him. He has deserted his wife, for the last three years has been absent from the district, and it is not known where he is at present. There is no doubt that the money was actually borrowed from the plaintiff, and there is nothing to shew that the judgment was obtained fraudulently or in collusion. And, lastly, the plea of coverture is essentially the privilege of the husband and cannot be allowed to be made use of by the defendant for the purpose of depriving the plaintiff of his due or his (the defendant's) daughter of her lawful property. It is therefore decreed that an undivided one half share of the lands and tenements described in the libel, being the property of Estranapulle, 2nd defendant in case No. 6682, are bound and executable under the judgment

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pronounced in the said case. It is further decreed that the defendant do pay the costs of the present suit."

In appeal, Grenier, for appellant. The judgment in 6682 was void and inexecutable, it having been obtained against a married woman who had been unrepresented by her husband. Christinæus, 2, 153, 4. Rodenburg, 3, 1, 1. Such a judgment would be of no effect and could not be enforced against the wife even after the dissolution of the marriage. Voet 5, 1, 14. If the husband were abroad or maliciously refused to assist his wife in a law suit, it was competent for the Court on being applied to for that purpose to interpose its judicial sanction and permit the wife to appear on behalf of herself or of her husband. Voet 5, 1, 16, 18. But in this case no such sanction had either been asked for or given; and the proceedings on which the execution was based were altogether illegal and therefore void.

Ferdinands, for respondent. Accepting the law as laid down by his learned friend, it was not competent for the defendant (the father) to raise the present objection. It might have been in the mouth of the husband, who had been waived in 6682, to object (if he could reasonably object) as being interested in one-half of the wife's property which had been mortgaged, but the father had no manner of right to the same and could not be heard.

Grenier, in reply. The judgment was *per se* void, and the Court was bound to treat it as such, no matter from whom the objection came.

Sed per CAYLEY, J.—" Affirmed. The property in question was specially mortgaged by the 2nd defendant in case No. 6682 with the consent of her husband; no objection was taken to the waiver of the 1st defendant in that case; and even if either of the parties to that case could have taken any exception to the judgment and execution on the ground of such waiver, the Supreme Court does not think it competent for a third party (who has no right of his own to the property sold) to deprive the execution creditor of the benefit of his judgment on the ground of any such alleged informality."

Estoppel.

D. C. Matara, 26358. In support of her title to the land claimed, the plaintiff depended chiefly upon two leases which she asserted estopped defendant from disputing her claim. The District Judge (*Swettenham*), referring to the leases in his judgment, held " the lease A (dated September 1868) is not given by plaintiff, nor by any one under whom she claims, nor by any one

authorised to lease on her behalf. It cannot therefore operate as an estoppel; if it did, as estoppels must be reciprocal, it would operate to prevent plaintiff claiming any portion of the $\frac{3}{4}$ therein leased by her son as his own property. The lease B (dated September 1865) is different. It is between the parties to this case. The law on the subject of estoppels has thus been laid down,—(Taylor on Evidence, 5th edition, sec. 85.) Estoppel.

"To make a recital operate as an estoppel, there must be first a statement of some material particular fact; secondly, a contract made with reference to such statement; and thirdly, either an action directly founded on the instrument containing the recital, or one which is brought to enforce the rights arising out of such instrument."

After determining (1) that all the facts recited were not material to the lease; (2) that even if the whole recital were material, the contract was not made with reference thereto; and (3) that the cause of action did not arise out of the instrument, inasmuch as defendant had given up possession of the land at the expiry of the lease, and it was not till his re-entry six months afterwards that the present action arose, the District Judge held that the defendant had proved his title "by purchase (deed dated 6th August, 1859) from one Dowan, and his vendor's purchase from plaintiff's brother through whom also plaintiff claims." The action was accordingly dismissed with costs.

In appeal, (*Ferdinands* for appellant, *Browne* for respondent) per CAYLEY, J.—"Affirmed. We think that the learned District Judge's holding on the question of estoppel is correct. The recital referred to, though, no doubt, strong evidence in favor of the plaintiff, cannot be treated as an estoppel, and this evidence has been satisfactorily rebutted by the evidence of title of the defendant."

D. C. Kegalla, 2457. The appeal in this case was rejected, the petition not having been drawn and signed by an Advocate or Proctor; and per STEWART, J.—"The Secretary of the District Court should not receive petitions of appeal, unless drawn and signed by an Advocate or Proctor. If any party is desirous of appealing without the intervention of an Advocate or Proctor, the Secretary should take down the grounds of appeal from the party himself viva voce, in the manner directed by the Rules and Orders of December 12th, 1843." Appeal.

D. C. Trincomalie, 21017. This was an action praying for ejectment. The District Judge (*Templer*) gave judgment as follows: "The defendant built the house on plaintiff's land, and Prescription.

Prescription.

has possessed it long enough to give him a right to it by prescription. He has no right to the land. Plaintiff will get judgment for the land, the defendant for the house in question. Costs divided."

In appeal, (*Ferdinands* for apppellant) per STEWART, J.—"Set aside and judgment entered with costs for plaintiff for the house, land, and premises in question, and that the defendant be ejected therefrom. There can be no doubt that the land on which the house in question stands belongs to the estate represented by the plaintiff. It is also clear that this house, whether built by the defendant or his uncle or by both together, was erected with the full knowledge that the land on which he or they were building was the property of the plaintiff's testator. The land being the property of the plaintiff, the onus of proof was on the defendant to establish an adverse and independent title in himself, or in those under whom he claims for the prescriptive period; and this he failed to do.........The present judgment to be without prejudice to any claim that the defendant or the legal representatives of his uncle may have for compensation."

Partition. Innocent purchaser *v.* mortgagee.

D. C. Kalutara, 26747. The plaintiff in this case, who claimed an undivided half of a certain land, prayed for partition, which the defendant objected to on the plea that he was the owner of the entire land by right of purchase. The facts of the case are set out in the following judgment of the District Judge (*Jayetilleke*): "The case No. 25584, D. C., and the evidence in the present case clearly show the defendant is an innocent purchaser, for valuable consideration, of the entire land, and that he had no notice of the previous mortgage over half of the land in favor of the plaintiff, until the latter had obtained judgment on his bond and seized the property in execution. The defendant had then already incurred considerable expense in building and making other improvements on the land. In case No. 25584 however, the present defendant had the option of paying off the mortgage, or rather the balance that might be found due on the plaintiff's writ after other properties mortgaged by the debtor had been discussed, and preventing the sale of the land in question. But this has not been done.........consequently half of the soil and trees were sold and purchased by the plaintiff himself for £80. In the present case, the plaintiff seeks to obtain a decree for partition; but in view of the nature and extent of the land, and the improvements made by the defendant who

has taken up his residence there with his family, a partition is inexpedient, if not impossible. This is therefore a case in which the Court ought to order a sale of the common property, giving either party the right to purchase the other's share." The District Judge valued the improvements, &c., made by the defendant at £140, and the land itself at £160, one-half of it at £80, and decreed "that on defendant paying the plaintiff the sum of Rs 800, the defendant be entitled to the whole land; and that in the event of his failing to do so, the plaintiff be entitled to the whole land on his paying the defendant Rs 2200; and that in either case, the necessary conveyance be executed at the joint expense of both parties. Costs divided."

Partition. Innocent purchaser *v.* motgagee.

In appeal, the judgment was affirmed, by CAYLEY, J., with the following addition to the decree: "If neither party shall become the purchaser of the premises in the manner aforesaid, the same shall be put up for sale at public auction and sold to the highest bidder; and, after deduction of the necessary expenses, the plaintiff's and defendant's respective shares of the purchase money shall be determined according to the proportion above mentioned, that is, in the proportion of 80 to 220."

Prescription by Executor.

D. C. Galle, 29302. The judgment of the Court below was affirmed; and per CAYLEY, J.—"Before an executor can be held to have acquired a prescriptive right to his testator's property as against a devisee, very satisfactory evidence should be required to show that the trust had determined, and that the possession had clearly become adverse before the alleged term of prescription began to run, and had continued adverse and uninterrupted during such term."

June 19.

Present STEWART and CAYLEY, J. J.

Dismissal operating as Non-suit.

D. C. Batticaloa, 17363. This was an action to enforce contribution from a joint maker of a promissory note, the plaintiff having paid the full amount thereof to the payee under a judgment of this Court. The plaintiff had unsuccessfully sued in a previous case, No 17292, in which however the defendant had led no evidence. The District Judge (*Worthington*) having ruled that the judgment of dismissal in 17292 estopped the present claim, the plaintiff appealed.

Dismissal operating as Non-suit.

Grenier, for appellant, was not called upon.

Per Stewart, J—"Set aside and the case is remanded for further hearing. Evidence was adduced only on behalf of the plaintiff in the former case between the parties. Following therefore the judgment of the Supreme Court in D. C. Kalutara, No. 16002, quoted by Mr. Justice Thomson in his Institutes, vol. 1, p. 336, and the later decisions on the point, we must hold that the judgment in the previous case 17292, that the plaintiff's case be dismissed, is in effect no more than a nonsuit. Where it is intended that the judgment against the plaintiff should be final, judgment should be given in favour of the defendant."

June 23.

Present Stewart and Cayley, J. J.

Appeal.

D.C. Kurunegala, 19427. The appeal in this case was rejected; and per Stewart, J.—"The petition of appeal is signed by a Proctor of the District Court of Kegalla who is not entitled to practise before the District Court of Kurunegala."

Evidence.

D. C. Chilaw, 20004. The plaintiff sued on a bond dated 22nd January, 1870, which had been granted by defendant in part satisfaction of a writ No. 18202. The defendant produced a receipt dated 11th March, 1870, which purported to be a discharge in full of plaintiff's claim on the said writ. The question therefore arose, whether the bond was cancelled when the receipt was given and its payment included therein, or whether the receipt was executed when the balance due was paid, the bond being left intact. The learned District Judge (*Wragg*) having excluded parol evidence in support of the latter view, on the ground that it would enable the plaintiff not merely to vary but directly to contradict his own written receipt, the plaintiff appealed.

In appeal, (*Ferdinands* for appellant) per Stewart, J.—"Set aside and case remanded for further hearing. Costs to abide the result. There is no mention whatever of the bond in the receipt. It appears to the Supreme Court that the receipt is only *prima facie* proof, and parol evidence may be received as to the facts. See Graves v. Key, 3 B and Ad., 318."

D. C. Negombo, 6281. The evidence in this case shewed that the defendant, who was an adjoining landowner and who had unsuccessfully contested a right of way with the plaintiff in a previous suit, was in the habit of wilfully driving his cattle into plaintiff's field to the injury of the dams, drains and fences therein, and to the prevention of cultivation. The District Judge (*Liesching*) awarded Rs 550 as damages against the defendant. Damages. Tort.

In appeal, the Queen's Advocate (*Ferdinands* with him) for appellant argued against the judgment as giving unproved and excessive damages. *Grenier*, for respondent, was not called upon.

Per CAYLEY, J.—" It is perfectly clear that in actions of torts, the misconduct of the defendant in the circumstances of the transaction may be taken into consideration in aggravation of damages. In the present case, the defendant's conduct has been very oppressive, and as the wrongful act was clearly done maliciously and with deliberate wilfulness, the Supreme Court sees no reason for interfering with the amount of damages decreed."

D. C. Colombo, 62422. The plaintiff in this case objected, under the provisions of Ordinance No. 5 of 1867, to the assessment made by the defendants (the Municipal Council of Colombo) of the annual value of certain houses belonging to him in Baillie Street, and prayed for a reduction thereof. The defendants answered that the valuation was not excessive; and the question submitted to the Court was whether the words " full and fair annual value," occurring in clause 63 of Ordinance No. 17 of 1865, should be construed to mean the gross or nett annual value of the premises taxed. The learned District Judge (*Berwick*,) having entered, in a long and elaborate judgment, into the question of construction on the analogy of the English Poor Law Act and the Acts relating to the English County and Watch Rates, held as follows :—" I am of opinion that the assessment is only leviable on the amount at which the premises can reasonably be let in average years, after deducting a reasonable sum for the probable annual average cost of repairs, insurance and other expenses necessary for their proper upkeep, and after deduction of all other public taxes and rates on the land, or which ultimately fall chargeable on the land. Rex vs. Hull Dock Company, 3. B. and C. 516, is instructive on the point of deducting previous rates ; and a great deal of useful information on the correct principles of valuation will be found in the House tax: Meaning of "annual value."

House tax. Meaning of "annual value."

cases collected in Burn's Justice of the Peace (29th edition) vol. "Poor," p. 290 et seq. The assessment complained of will be set aside. It is unnecessary for the Court to amend it, as it was arranged by Counsel to take the opinion of the Court only on the question of principle; but leave will be reserved to either party to move that the case be set down for evidence and judgment on the actual annual value of the premises. Defendant will pay the costs of suit hitherto incurred.

In appeal, the Queen's Advocate for appellant. The English authorities were inapplicable in the construction of the words "annual value" which had a local meaning given to them by Ordinances 4 of 1834 and 16 of 1865, the former of which enacted that the annual value was to be assessed according to the yearly or other rent or value at which the premises assessed were let or held. The gross and not the nett value was therefore clearly intended by the legislature. If, however, English precedents were to be relied on, there was the case of *Elstone* v. *Rose*, 4 L. R. 4, in which the Court of Queen's Bench held that "annual value" meant the *gross* and not the nett rent.

Grenier, for respondent. The Ordinance of 1834 was repealed in 1844, and in the absence of an interpretation clause in the Ordinance of 1865, the words "full and fair annual value" should be accepted in the sense in which the words were used in the English Acts relating to the same subject. 10 Geo: 4, c. 96; 6 and 7 Will: 4, c. 96; and 2 and 3 Vict: c. 28. This principle of construction was fully recognized by the Appellate Court in Davids' case, D. C. Galle, 28914, *Civ*: *Min*: September 27, 1870. *Elstone* v. *Rose* did not apply. The question there was one solely of jurisdiction, and the true effect of the decision was explained in the more recent case of the Sheffield Water Works Co: v. Bennett, 28 L. T. (n. s.) Exch: 509.

Per STEWART, J.—"Affirmed. This is a case of considerable importance affecting the revenues of the Municipal Council of Colombo as well as the rights of property and residents within the Municipality; and having carefully considered the question involved in the appeal now before us, we have come to the conclusion that the decision of the District Court is correct, and should be affirmed for the reasons given by the learned District Judge in his able and elaborate judgment. The simple point for determination is, what is the true signification of the words 'annual value' which occur in the 63rd section of the Ordinance No. 17 of 1865? It is needless to go over the grounds and reasons set out in the judgment. But we may remark that

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we entirely concur with the learned District Judge in his exposition of the meaning of these words, not only in view of what we ourselves conceive to be their true signification but following, as he does, the opinion of Mr. Justice Bayley, in R. *v.* Tomlinson, 9 B. and C. 163, according to whose high authority, in the case of houses, the annual profit or value is always a *part* only of the annual rent paid to the landlord. In the argument before us our attention was called by the Queen's Advocate to the 34th and 38th sections of the Police Ordinance No. 16 of 1865 with the object of showing that the words "annual value" were used synonymously with rent and meant the actual rent paid;—the 34th section creating a tax on the *bona fide* annual value of "such houses, etc.," and the 38th providing for returns to be supplied to the Committee on the following terms, "the owner and occupier of such house, etc., to furnish them with the returns of the rent or annual value." It will be seen on reference to the 63rd section of the Ordinance No. 17 of 1865 (the Municipal Ordinance) relating to the appointment of valuators and the assessment they are empowered to make, that the word rent does not occur in that clause, the valuators being required to assess the property "according to its full and fair value." There is a similar absence of the word "rent" in the 53rd section of this Ordinance, which would rather seem to indicate that in the 38th section "rent" was included with the object and for the purpose merely of requiring the owner or occupier, as the case may be, to give the rent or annual value, so as to afford the means for the rate being properly ascertained and fixed. At all events we cannot by bare implication engraft this provision into the Ordinance No. 17 of 1865. We have only to add that the case of in re Elstone v. Rose quoted in the petition of appeal does not immediately affect the question in issue on this appeal. The point decided there was that the amount of value to the tenant, and not the amount of value to the landlord, was the proper criterion of value for the purpose of ascertaining the jurisdiction of the County Court in a suit between the landlord and the tenant. The question raised in the present suit was not touched in that case. The latter case is, however, an important authority for the position that where an expression, the meaning of which is left uncertain, occurs in a Statute, it may properly be interpreted by the legislative exposition given to the same expression in other Statutes; and if we compare the expression "annual value" in the Municipal Council's Ordinance with the same or similar expressions in the English Statutes, after the model of which our

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Ordinance has to a great extent been framed, it will be clear that the interpretation put upon the words by the learned District Judge is correct. It is true that in some of the English Statutes the term is *nett* annual value, but that is not the case in all. See 3 and 4. William IV. c. 90. s. 33 cited by the District Judge; and 15 and 16 Victoria, c. 81. s. 6."

Guarantie.

D. C. Galle, 34602. The plaintiffs, J. R. Bell and Company of Colombo, had sold and delivered to one Tranchell at Galle a quantity of liquor of the value of Rs. 410. 75. Tranchell had granted the plaintiffs a promissory note, which however was subsequently dishonored, and the amount, it was alleged, could not be levied in execution by plaintiffs, who had duly obtained a judgment, by reason of Tranchell not being possessed of any property. The plaintiffs now sought to recover the debt from the present defendant on the guarantie contained in the following letter, which he admitted having addressed to the plaintiffs *before* the delivery of the goods to Tranchell.

5th July, 1872.

Gentlemen—Your note of yesterday I have duly received and shall most certainly guarantie the actual payment of Mr. Tranchell to any dealings he may have with you; and I can again confidently recommend him as a good customer. Kindly send the price list of liquor, etc, which I requested in my last. As for the vice it is of no use to me and you are at liberty to dispose of it on my account. Hoping to hear from you by return of post,

I am, &c.,
D. S. Weerasiru.

J. R. Bell and Co., Colombo.

The defendant pleaded (1) that the acceptance by plaintiffs of Tranchell's promissory note relieved him of his liability, if any; (2) that the letter contained no valid guarantie within the true intent and meaning of the Ordinance 7 of 1870; and (3) that, assuming there was a guarantie, the letter could not be used as it was not stamped.

On the issues thus raised the case went to trial, and the defendant, on being examined by plaintiff's Counsel, stated as follows;—

I am resident in Galle. I know plaintiff, I correspond with him. I buy a few things from plaintiff. I have known plaintiff for 18 years. I know Tanchell mentioned in the libel very well. He was a ship-chandler. He wanted some goods to be sold. I recommended Tranchell to the plaintiff. He wrote to me and asked if he could rely on the man (Tranchell), I wrote to the plaintiff on the subject. (Letter with libel shown). This is the letter I wrote. It is a letter I wrote to the plaintiff before the plaintiff supplied Tranchell with wines. The plaintiff's manner of doing

business is to take promissory notes. I have made similar recommendations to the plaintiff in regard to other people, and from them also the plaintiff has promissory notes. I heard of a warrant against Tranchell. I spoke to Mr. Jansz, plaintiff's proctor, and asked him to give Tranchell time to pay the amount. Mr. Jansz asked a letter to that effect, which I declined to give.

The learned District Judge (*Roosmaleecocq*), having held against the defendant on all the three points raised in his answer, gave judgment for plaintiff with costs.

In appeal, the Queen's Advocate, for appellant. The letter was merely an *offer* of guarantie, and did not bind the defendant, in the absence of any proof that plaintiffs had noticed the defendant of the acceptance by them of the guarantie or that the defendant had subsequently consented that it should be a conclusive guarantie. M'Iver v. Richardson, 1 M. and S., 557. But assuming it was a guarantie, the consideration for the promise did not appear in the document, and it was therefore not binding. Meera Saibo v. Falconer, Legal Miscellany, 28. Civil Minutes, 30th June, 1852. The alleged guarantie moreover was not stamped and should not have been received in evidence.

Grenier, for respondent. In the case of M'Iver and Richardson the words used were "I have no objection to guarantee," and were properly construed to mean a mere offer. Here the language was definite ("shall most certainly guarantee") and was addressed to the plaintiffs in reply to their letter, acknowledging the original correspondence from defendant recommending Tranchell. Nothing but an absolute guarantie could have been intended. It was not necessary that the consideration should appear in express terms; it was enough if it could be gathered from the document that such and no other was the consideration on which the undertaking was given. Raikes v. Todd, 8 A and E, 846; Hawes v. Armstrong, 1 Scott, 661. The letter did not require to be stamped, as it came within the exception in the Stamp Ordinance as an agreement *relating to* the sale of goods. Warrington v. Furbor, 8 East, 242; Watkins v. Vince, 2 Stark., 368.

Per Stewart, J.—" Affirmed. It has been held by this Court, in more than one case, that the consideration for a guarantie should appear on the face of it, and it is too late now to question the correctness of that decision. It is not, however, essential that the consideration should be expressly set out in the writing in so many words, but it is sufficient if, by fair and necessary implication, it can be collected from the document itself. See *Hawes* v. *Armstrong*, 1 Scott, 664. The defendant, in the letter upon which this action is based, says, 'your note of yesterday I have duly received, and shall most certainly guarantee the punct-

Guarantie.

ual payment of Mr. Tranchell to any dealings he may have with you; and I can again confidently recommend him as a good customer.' It would, therefore, appear that previous correspondence had passed between the parties, and that the defendant by the letter in question promised the plaintiff to guarantee payment by the purchaser, and further reiterated his previous recommendation of him as a good customer. This letter, it should also be remarked, concludes with a request that the plaintiff would send the defendant 'a price list of liquors,' &c. Further, according to the libel, the claim of the plaintiff against Tranchell was entirely for money for liquor sold, but payment for which the plaintiff failed to realize, the amount still remaining unsettled, though writs had issued against the purchaser. Nor is it denied that the liquor which Tranchell obtained was delivered to him after the receipt of the defendant's letter, and in consequence of it. The words, 'I shall most certainly guarantee,' taken with the context, do not seem to us to import that any further act was to be done by the writer to complete his undertaking; there is a distinct promise in the letter to be responsible as far as he was concerned, and all that was necessary to effectuate his liability was the sale and delivery of the goods which, as already stated, duly followed, and thereby perfected the guarantie. The letter of the defendant appears to us to leave no doubt that it contains a promise, as well as a consideration for that promise, sufficient to constitute an agreement, and consequently a valid guarantie under the Ordinance of Frauds."

June 26.

Present STEWART and CAYLEY, J. J.

Right of fishing. *Madel* and *Nooldel* nets.

D. C. Matara, 26827. The plaintiffs complained that while they were fishing at Moderawella with nool-del nets, the defendants, who used madel nets, disturbed them in the exercise of their right, to plaintiff's damage of Rs. 375. The defendants pleaded "that Moderawella was not a portion of the sea, and that it had been used for upwards of a third of a century for fishing only with the madels, according to the custom of the fishermen of the place." They further denied having caused any damage as alleged.

The learned District Judge (*Swettenham*) gave judgment as follows:—"The issues in the case are (1) were plaintiffs inter-

Right of fishing. *Madel* and *Nooldel* nets.

rupted by defendants as alleged; (2) had plaintiffs a right to fish where they cast their nets? As regards the first point, I consider that it has been fully proved that plaintiffs did cast their *nool del* and did encircle a small shoal of fish, which they were prevented from taking by defendants' wrongful act in lifting up the net, so as to allow the fish to escape. All the admitted facts confirm plaintiffs' story. The spot at which the plaintiffs were fishing appears to have been 350 or 400 fathoms off the shore, close to some rocks and on the shore side of them. Defendants pleaded a right by custom to fish the whole of *Moderewella warava* by drag nets (*ma-del*) to the exclusion of all other modes of fishing. It appears that those drag nets are used in rotation—a day for each net—and that it was 3rd defendant's turn on the day in question, but he did not fish as there was no shoal near enough to capture—a drag net cannot be handled over rocks. I am not satisfied that plaintiffs were fishing over ground usually swept by drag nets. The evidence does not establish this—and some of the statements go decidedly to shew that plaintiffs were well outside of the ground usually traversed by drag nets. A *madel* does not exceed 600 fathoms in length—it is stretched in the shape of a segment of a circle from the shore--the farthest point of a large net from the shore would not exceed 240 fathoms which is 100 fathoms short of the plaintiff's station on the day in question. The custom pleaded by defendants does not appear to me to form a defence in this case. It was set up as a defence in case No. 21959, D. C., and was then pronounced to be untenable by the Supreme Court. It is unreasonable that the *madel* owner, whose turn it is to fish, should, when not occupying the water in any way, be able to prevent any one else fishing. It is unreasonable that a custom, which has existed solely for the convenience of drag net owners, should be used as an engine for preventing the introduction of new and improved nets. In fishing, as in every other industry, improved appliances, when introduced, diminish the profits of all who do not at once adopt the innovation. The true remedy for the sufferers is a timely adoption of the invention and not an attempt to restrict the use of it. When no other net is being used at the spot, it seems to me that the owners of a *nool del,* or of any other kind of net, have a perfect right to fish wherever they please, whether a drag net is usually drawn over the place or not. Judgment for plaintiffs against the defendants jointly and severally for the sum of Rupees three hundred, as damages, and costs of suit."

In appeal, (*the Queen's Advocate* for appellant, *Ferdinands*

Right of fishing. *Madel* and *Nooldel* nets.

for respondent) per CAYLEY, J.—" Affirmed. It was held by this Court in case No. 16,645, C. R. Galle (Lorenz' Reports p. 161) that the common right of fishing in the open sea may be controuled by custom regulating the time and mode of fishing. But such custom must be reasonable, and the Supreme Court does not think a custom reasonable, which excludes all other modes of fishing, except that with the *Madel*, which is a huge and costly net and requires a great number of persons to work it. Such a custom was held untenable by this Court in the case No. 21,959, District Court, Matara. Moreover this alleged custom is not proved in the present case. The only evidence in support of it is that Madel nets were exclusively used until Nool nets were introduced into the District. To hold that the use of the only known form of net, for a number of years, raised a custom, by which any other form of net was excluded, would be a bar to any kind of improvement in this branch of industry. Since the introduction of the *Nool* net the matter has been the subject of constant litigation, and the alleged custom has never been acquiesced in by the owners of the latter kind of nets."

June 30.

Present STEWART and CAYLEY, J. J.

Appeal on facts.

D. C. Kandy, 59069. In this case the judgment, which was entirely a finding on facts, was affirmed in the follwing terms :— " The evidence is absolutely contradictory and gross perjury has been committed on one side or the other. In cases of this kind, the learned Judge who hears the evidence and has the means of personally observing the demeanour of the witnesses is in a far better position for ascertaining the truth than this Court which has to form its opinion merely from the written notes taken by the Court below ; and it is only in cases where we are clearly satisfied that the Court below has taken an erroneous view of the evidence, that we should venture to set aside a verdict on a question of fact which has been fully investigated and on which the learned Judge has expressed a decided opinion. In the present case, no sufficient reason has been laid before us for differing with the Court below ; and the non-registration until 1872 of the conveyance which was executed in 1866 (which non-registration is unexplained) raises a strong presumption against the bona fides of the defendant's possession of the deed." (*The Queen's Advocate* for appellant, *Ferdinands* for respondent.)

July 3.

Present STEWART and CAYLEY, J. J.

Divorce. Condonation.

D. C. Colombo, 62489. The plaintiff, who was a Brahmin priest, sued for a divorce on the ground of adultery and malicious desertion, but his prayer was dismissed by the learned District Judge (*Berwick*) in the following judgment which fully explains the facts of the case :—

The parties were married according to Hindoo usages in 1857 and cohabited till 1861, when, according to the evidence, the defendant left plaintiff. The plaintiff has attempted to show that since his wife left him, she has lived in adultery first with Muniandi and afterwards with Muttipulli ; and he has called a man Mootoosamy and two women, Naku and Sunderam, to prove this. The evidence however is of a very unsatisfactory character, both as regards the witnesses themselves and their credibility when tested by dates. According to Mootoosamy, defendant lived with Muniandi from 1861 till 1865 or 1866, and *then* went with Muttipulli and cohabited with him for only a year. But according to Sunderam, she continued living with Muniandi down to about 1871, and the alleged cohabitation with Muttipulli is altogether ignored. The witness who so deposes professes to have been herself living all this time along with the defendant as joint wives of Muniandi. Clearly, either she or Mootoosamy must have given untrue evidence. According to the woman's account of herself, no one could have better means of knowing the actual truth than she ; but, on the other hand, Mootoosamy details that he was the very person who rented to Muttipulli the house he and defendant cohabited in, and rented it for that express purpose. Nothing is *per se* more probable among native women of the class we have to deal with here, than that she has cohabited with other men during the 12 years that have elapsed since her separation from her husband ; but this is not enough : a Court of Justice must have credible evidence of the cohabitation, and I think credible evidence is wanting in this case. But there are other objections to decreeing a divorce. It appears that plaintiff himself, about a year after the separation, went through the Hindoo ceremony of divorcing his wife under the auspices of a priest ; and after doing that, I do not think he can be allowed to obtain judgment in this suit on the ground either of any act of adultery committed after that proceeding, or of desertion subsequent thereto. There is no room for the idea of any malicious desertion by the wife in the subsequent period.

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and it would be contrary to reason and nature to hold the wife responsible for adultery committed after her husband had led her to believe that their marriage was legally dissolved ; and such must have been the belief of a common native woman like this, who could know nothing of law beyond her notions of Hindoo ceremonies. We are therefore restricted to acts of adultery or desertion committed in the course of one year following the separation in 1861 ; and granting this proved (for the sake of argument only, being facts which may or may not be true) we are met with the fact of 12 years' delay by the plaintiff in bringing his action. Now condonation may be implied from delay in instituting proceedings, when the delay is not accounted for ; and a delay thus unexplained forms a presumption of passive acquiescence in the complainant. I. Burge, 659. *Remissio injuriæ* bars the action, and this is inferred from long delay of the action importing acquiescence. *Bell's Principles*, §. 1533. I do not indeed find it expressly so stated in any work on the Roman Dutch Law at my disposal (I do not have access to *Brouwer*,) but it flows naturally from the general principles which I do there find stated and has been so recognised at the Dutch Colony of the Cape of Good Hope. A case in point decided in 1848 is reported in Menzie's Cape Reports, p. 283. In that case a wife who was separated from her husband had, to his knowledge, cohabited with her paramour for 18 months, and a divorce was refused, and the further hearing postponed to enable the plaintiff to bring such other evidence as he might think fit in explanation of his conduct. This case has the more weight from the circumstance that it clashes with a previous decision in 1843 (reported at page 278) where the delay of a separated wife for 12 years, after knowledge of her husband's adultery, was held not to constitute condonation. The rational test seems to lie not *ipso facto* in the delay itself after knowledge, but in the answer to the question,—whether the circumstances import passive acquiescence ? and *Remissio injuriæ ?* ; and such a long delay as this throws on the plaintiff the burden of establishing the circumstances and explaining it. He has attempted to explain it by showing that he had been advised by Counsel, the late Mr. Lorenz, within a month after his wife left him, that his marriage was invalid for want of registration under Regulation 9 of 1822, and that therefore no divorce was necessary or possible ; and he says that he only discovered the erroneousness of the opinion the other day. I do not put faith in this story, which he has not a scrap of writing to prove ; and he has stated that Mr. Lorenz was then living in a house (Uplands) which he certainly never

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lived in since he came out from England, and entered on the practice of his profession. The opinion itself would indeed have been perfectly correct at its alleged date (1861), but it is to the last degree improbable that Mr. Lorenz should further have advised him, (as plaintiff states in the affidavit filed with his replication) that the Hindoo marriage could be dissolved by Hindoo rites; as such an opinion would be in the very teeth of section 29 of the Marriage Ordinance of 1847, which was then in force. It must have been manifest enough to plaintiff himself, that if there was no marriage there was no need of any divorce, except to satisfy religious scruples, if there are any such in the sect he belongs to, with respect to the mere manner of making and loosing the matrimonial tie. Yet he alleges Mr. Lorenz' opinion as the reason for his having gone through the subsequent ceremony of divorce by a Hindoo priest. Quite inconsistent too with this story of his having consulted Mr. Lorenz and with his own alleged belief of the legal invalidity of the marriage, is the statement in the affidavit that the affirmant "believed and acted as if the *marriage had been properly dissolved*" by the native ceremony. This evidently points not to religious but to legal ideas. It may be said that the fact of having gone through the native ceremony of divorce implies a non-acquiescence in his wife's conduct, but he cannot be allowed with one lip to plead the informal divorce as the explanation of the delay and to plead with the other lip that he had been advised there never was any marriage at all, and thus set up two contradictory explanations of his delay. In truth there never was any valid consentient marriage between plaintiff and defendant. There was no valid marriage in 1857; nor any subsisting in 1861, when the separation occurred, and the ceremony of 1857 only became a marriage on 1st March, 1867, when the Ordinance 13 of 1863 was first proclaimed and when § 3 of that Ordinance operated by *ex post facto* legislation to make the ceremony of 1857 valid. In strictness, therefore, his laches from a legal point of view only dates from 1867, and I can quite understand that as a matter of fact he was quite ignorant of the change in his status which (not his intention but) the law then effected, which has doubtless made many another person married without their consent or knowledge, through the absence of any provision to validate prior native divorces as well as prior native marriages. Wherefore, if it had been a bona fide ignorance of that strange legislation of 1867 (which married people without their own knowledge,) that was the true cause of his delay, I should be disposed to think the explanation quite satisfactory. But it cannot be con-

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scientiously said, and has not been alleged, that this in the least influenced his conduct. So far as HE is concerned, the delay since 1867 was no more than a continuance of the same state of mind and inaction that had operated since 1861. Now placing no credit in his story about Mr. Lorenz' opinion, that must be considered an inaction in the face of his own belief that the marriage had been valid; and it would be a mere technical quibble and untruth to say, that on legal grounds connected with fluctuations of legislation of which he was wholly ignorant there was not passive acquiescence in his wife's conduct from the time of the Hindoo form of divorce a year after their separation (1861) when there unquestionably was such laches and acquiescence, if his conduct be tried as it ought to be, by his own idea of what the law was,—that idea being that the marriage was valid. On these grounds, therefore, even if the fact of adultery or malicious desertion *prior* to the formality of the native divorce could be held established, I consider the plaintiff not entitled to a judicial decree of divorce. As the laches was not specially pleaded, I think it expedient to note that the objection was duly taken by the defendant's Counsel at the trial on the evidence that then transpired. The prayer for divorce is refused.

In appeal, Ramanathen, for appellant. In cases of adultery exact dates need not be proved. Proof of general cohabitation was sufficient. (*Loveden* v. *Loveden*, 2 Haggard's C. Rep.) [But how do you explain the delay and consequent passive acquiescence?—STEWART, J.] There was no delay. In a legal sense laches commenced only after 1867. [Has any act of adultery been proved after 1867?—CAYLEY, J.] Yes, if the witnesses were to be believed. A period of six years therefore was not so great a delay as to justify the refusal of a divorce. Neither was there any passive acquiescence. This was a peculiar case and the Court had to deal with the ideas and mental attitudes of an eastern community, apart from a European stand point of view. To do substantial justice, the Court should transport itself to the atmosphere of Hindu thought. (Maine's Ancient Law.) The parties were Brahmins, and the rigorous code of customary law among them was to punish adultery with death, or what was considered the same thing, to perform funeral ceremonies in respect of the guilty woman. She was thus to all intents and purposes dead to her husband. The possibility of connivance, therefore, could not enter into the consideration of this case.

Grenier, for respondent, was not called upon.

Per STEWART, J.—Affirmed.

Landlord and tenant.

D. C. Colombo, 62957. The plaintiff, as widow of one Theodoris Allis, claimed a life interest in her husband's estate, which included a garden at Colpetty with the buildings standing thereon; and alleged that the defendant, who had occupied a house on the said garden as a monthly tenant during the lifetime of her husband (who died in March 1862), and subsequently as tenant under the plaintiff herself, at a monthly rent of one rupee, now refused to pay rent due from January 1873 and disputed plaintiff's title. The defendant, in his answer, pleaded that a third party (Hendrick Perera) had "in 1851 granted to him a certain portion of the premises in dispute, and had given him permission to erect a dwelling house thereon and to occupy the same, rent free, in consideration of the services previously and then rendered by defendant and his wife and by the family of the latter." He further pleaded prescription in bar of plaintiff's claim. The plaintiff, in her replication, admitted that Hendrick had been the original owner and that his widow had given the defendant permission to erect the house in question, but set up title through her own husband by purchase from Hendrick's widow in 1857. She also repeated her former allegation that defendant had paid her rent till the end of 1872.

The learned District Judge (*Berwick*) held as follows:

"On the question of payment of rent, I rely, and rely only, on the evidence of the woman Welmina, who proves the payment by the defendant of a *ground-rent*. Now this 'ground-rent' is very unlike what we ordinarily understand by the simple word "rent." It exactly represents the idea under which persons having a 'planting interest' pay what they call the 'ground-owner's share,'—they themselves as planters having at the same time an indefeasible and inheritable right in the plantation. It, in fact, represents the *Emphyteusis* of the Roman Dutch Law which in almost the entirety of its incidents is one of the most ordinary customs of the Cingalese, though not perhaps ordinarily known to them by that law term. I have no doubt the ground-owners gave the defendant permission to build a house on their ground and to occupy the same for some nominal or real ground rent, and if the permission had been formal and notarial the defendant would have had a valid and permanent title as an 'emphyteuta' to the occupation of the area so long as the house should stand on it. But as there was no written and notarial deed in his favor, no interest in the land passed to him by virtue of the permission accorded to him. But he has acquired by prescription that right of emphyteusis which was imperfect in the mode of the grant. It will therefore be declared that the

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plaintiff is the ground-owner of the area occupied by the house in question, subject to the defendant's right of occupation as an emphyteuta or perpetual tenant on payment of the ground rent. What that ground rent was is not very clear. On the whole I think it was one rupee a month, and that amount will be declared. An emphyteuta or perpetual tenant (like a service parveny tenant) is liable to be evicted on refusal or failure to pay the rent on due demand. And possibly the defendant has incurred that liability in this case. But the law does not lean to these forfeitures (see Van Leeuwen), and, as it happens, the plaintiff has not sued for a forfeiture on the ground of a breach of a condition of the tenure of emphyteusis or perpetual tenancy. She claimed much more than she is now considered entitled to. She claimed the full ownership, subject to a mere *monthly tenancy*. Not having sued for a forfeiture of the tenure of emphyteusis, the Court sees no ground for declaring it. Plaintiff will receive 15 shillings as arrears of ground rent. Each party having been wrong, they will pay their own costs of suit."

In appeal, (the *Queen's Advocate* and *Grenier* for appellant, *Browne* for respondent) per CAYLEY, J.—" Set aside and judgment to be entered for the plaintiff with costs for the house and ground claimed in the libel, and that the defendant be ejected therefrom. It is also decreed that the plaintiff recover from the defendant rent at the rate of 50 cents per month from the 1st January, 1873, until he quits possession of the said premises. There was no claim as emphyteuta set up in the answer, but of title in the defendant as absolute owner by prescription; and this was the only issue raised on the pleadings. The monthly rent proved to have been paid must, in our opinion, be taken as an acknowledgment by the defendant of title in the plaintiff, in the absence of legal proof of the defendant being owner by some other title. To hold otherwise would in effect be allowing a tenant or occupier of premises, who may have regularly paid rent for more than ten years, to set up a title as an emphyteuta in perpetuity against the landlord and proprietor. This judgment to be without prejudice to any claim that the defendant may have for compensation for erecting the house."

Bond. Parol evidence.

D. C. Kandy, 59195. The plaintiff sued on a Bond dated 5th August, 1872, for the recovery of Rs 255 and interest. The defendant pleaded payment and led parol evidence in support of his defence. The learned District Judge (*Laurie*) held as follows.

Bond. Parol evidence.

"In this case I have felt and indeed still feel great hesitation. I am uneasy in receiving and in giving effect to parol testimony to prove the extinction by payment of an obligation constituted by a formal Bond under seal, which is still in the original creditor's hands. By the Law of Scotland, with which alone I am familiar, no written obligation can be extinguished except by a writing under the creditor's hands or his admission on oath that he has been satisfied : the ground of that rule is not so much that witnesses are not believed, but that they are apt to mistake both the amount of money paid and the precise object of the payment. Even by the law of England, which admits parol testimony in many cases in which it is rejected in Scotland, I find it laid down by Taylor and other authorities, that a deed under seal can only be discharged by writing. But it is pleaded in this case, nd indeed admitted by Counsel, that in this Colony a further step has been taken. Deeds which like the present one profess to be under seal are regarded as simple contracts, and however solemnly the obligation has been constitued it may be proved by parol to have been discharged. I was referred to several decision of the Supreme Court which seem to support this proposition Therefore, while I cannot help expressing my doubts whether the law be good, especially in a country where parol testimony is less to be relied on than at home, I must take the proof here as it has been presented to me ; and on it I have no alternative but to give judgment for the defendant with costs. Plaintiff's claim is dismissed with costs."

In appeal, (*Grenier* for appellant, *Ferdinands* for respondent) per CAYLEY, J.—"Set aside and judgment to be entered for the plaintiff with costs. Parol evidence of payment in discharge of a bond is no doubt legally admissible in this country. But it by no means follows that the witnesses a party may call to prove payment should be believed. Where the grantee holds the bond, clear and trustworthy evidence of a strong and conclusive character is necessary to establish payment ; and the possession of the instrument by the creditor should also be satisfactorily explained : otherwise no obligee would be safe. In the present case, it is highly improbable that a Moorish trader, such as the 2nd defendant, would under the circumstances appearing in the evidence have paid so large a sum as £ 37. 10, without obtaining a receipt or getting back the bond. The evidence of payment accordingly should have been correspondingly strong and reliable ; whereas that adduced by the defendant is, on the contrary, in our opinion open to grave doubt and suspicion. There is, moreover, the testimony of the plaintiff, which seems to us credible and consistent with the probabilities of the case."

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Budhist priesthood. Bequest by incumbent to co-pupil.

D. C. Kurunegala, 19413. Kotagama Unanse, chief priest of the Rukmale Vihare, robed his grand-nephew Kehelwatugode Unanse when a child of 10 years old, and executed in the year of Saka 1739 (A. D. 1817) in his favour a deed of gift of all the temple and other lands belonging to himselt "by right of robing succession." On the 11th March, 1845, Kotagama on his death-bed executed a deed whereby "in making disposal of my property" he, *inter alia*, granted "to my pupil Kehelwatugode" a field, a temple and all his property at Ambaekke; to Inde, Welugodde, "a priest of the descendants of my tutor," other lands; to "my pupil Kotegaloluway" other lands; to "Karewilagala, the pupil ol my tutor, who is rendering much assistance to me at present, the Rukmale Vihare village situate at Kotangampale Korle in the district of Seven Korles, and all the moveable and immoveable property thereto appertaining"; to Paepole and Pitiyagedere "who as my own pupils are rendering much assistance to me" certain lands in Kandy; and "moreover appointed that the remainder of all my moveable property * * * shall be equally divided among the aforenamed six priests." Kotagama died on the 13th March, 1845, and his Will was on the 5th July, 1845, propounded in case 18401, District Court, Kandy, by all the legatees, except Kehelwatugode who opposed it as a forgery; but its validity was established by a decree of the 12th June, 1846. From that decree Kehelwatugode appealed. In November 1853, the Supreme Court remitted the case to the District Court to have the representative of one legatee, then dead, made a party, and this having been done by the District Court, order was then made on the 2nd February, 1855, that the case should be returned to the Supreme Court. The case was apparently mislaid for some years, as it had not reached the Supreme Court on the 3rd March, 1859. In September 1864, the Will itself was produced in evidence in a case 30879, D. C. Kandy, but the case 18401, in which it had been filed, was not received by the Supreme Court till the 30th July, 1872, and on the 4th September following the appeal was rejected, "it having been decided long ago that the appeal had been abandoned."

In the interval between 1846 and 1862, several law suits arose between Kotagama's legatees. In the first case (30879, D. C. Kandy, 1861—1864) the bequest in favour of Paepole and Pitiygedere was upheld as against the claim of Kehelwatugode as pupil and heir, it being proved that the lands bequeathed were Kotagama's private property and not temple lands. In December 1870, the successor of Karewilagala brought an action (18887, D. C. Kurunegala) against Kehelwatugode who, he alleged,

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had expelled him from the possession of the Rukmale Vihare, but this case was withdrawn without prejudice, pending the decision of 18401, D. C. Kandy, then received by the Supreme Court Finally in 1873, after the Will had been upheld in appeal, Karwilagala's successor brought the present case against Kehelwatugode and his sub-priest Maldeniya for this Vihare. For the plaintiff, it was alleged in the pleadings and evidence that, after the death of Kotagama, Karewilagala as legatee thereof entered into possession of this Vihare in 1846 and continued thereon till 1852 when he died. He was succeeded by plaintiff, who in 1853 put in charge a priest Nungomue, and the latter continued in charge till October 1868 when he was ejected. The 1st defendant, in denial of the plaintiff's possession, asserted that he himself had possessed since the institution of the case 18401, D. C. Kandy, in 1855, till the present time, and adduced evidence to prove that he had in charge under him at different times Mudunne (dead), Jumbulgodde (dead), Rekowa, Ratempola (1862-1867), 2nd defendant, Kadyonuwa, and Dambadeniya: and claimed to hold the incumbency of the Vihare, &c., belonging to the late Kotagama by *Gnati-Sisiya-parampara wa* as his pupil and relative, and by virtue of the deed of 1817. To the replication of the plaintiff claiming title under Kotagama's will, defendants rejoined that Kotagama had no right to execute such a last will and deviate thereby the succession to trust property, such as the Vihare and its endowments. In addition to the conflicting evidence on either side, the cases 18401 (Kotagama's will) and 30879 (Paepolle and Pitiyagedere's legacy) D. C. Kandy, and 18887, D. C. Kurunegala (previous suit withdrawn) were put in evidence by the plaintiff, and cases 18218 and 18569 D. C. Kurunegala by the defendants. Of the latter, 18218 was a possessory action brought by 1st defendant in 1866 against Ratempola as his defaulting manager of this Vihare under a power of attorney which 1st defendant had cancelled, and 18569 was a possessory action brought by Nungomue against 2nd defendant in 1870, in which the former was declared entitled to certain temple lands.

The District Judge (*J. H. De Saram*) after reviewing the history of Kotagama's will case, 18401, D. C. Kandy, said —"The questions arising for decision are, First—is it competent for either party to claim the lands by prescription? Second—can the defendant question the validity of the bequest to plaintiff, he having originally disputed the will only on the ground of its being a forgery?—Third—Had the deceased Kotagama a right to dispose of the Temple to the

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plaintiff? First, possession will not benefit either party, as the case No. 18401 must be regarded as pending till 1872, when the appeal was finally rejected, and this will prevent prescription running. Secondly, the will being upheld will not prevent the validity of the bequest being disputed, and the fact of the 1st. defendant having consented to judgment being entered in No. 30879, D. C. Kandy, for certain lands in favour of purchasers from Paepole and Pitiyagedere, legatees under the will, does not debar him from disputing the bequest to the plaintiff's tutor, as the lands in dispute in that case were the private property of the testator. (Supreme Court judgment, 26th January, 1860, in that case). Thirdly, in determining the third question proposed for consideration, it is necessary to ascertain the mode of succession to this Temple, and it is important to look to the wording of the will. Unfortunately, the original is not in the case, and it was stated by Counsel at the trial that it was abstracted from the record and is not forthcoming. There is however a translation filed, and from the endorsements on it, and from the record made in the case when it was filed, it is clear that it is the one that was filed with the will. The plaintiff is the pupil of the late Karewilagala Unanse to whom the Rukmale Vihare was bequeathed, and it is through him that the plaintiff now lays claim to the Vihare. The plaintiff in his examination admitted that the testator succeeded his tutor in the management of this temple, so that it is clear the succession to the incumbency is regulated by the *Sisiya-paramparawa*. The 1st defendant however contends that the succession is by the *Gnati-sisiya-paramparawa*, that is that the pupil should also be a relation of the deceased priest, but this question does not arise in the case as between the plaintiff and 1st defendant. In this will (according to the translation) the testator designates Karewilagala Unanse as 'the pupil of my tutor' and calls the 1st defendant 'my pupil.' This declaration that Karewilagala Unanse was the testator's fellow-pupil is conclusive, and from the leading case on the right of succession to Vihares (366, D. C. Kurunegala) it is clear that Kotagama Unanse could not bequeath his trust and will away the temple and its endowments to his fellow pupil, to the exclusion of his pupil, the 1st defendant. It is therefore decreed that the plaintiff's claim be dismissed with costs, and that the 1st defendant as pupil of Kotagama Unanse be quieted in the possession of the Rukmale Vihare with all the endowments thereof." Against this decision the plaintiff appealed.

Browne, for appellant. First, the bequest by Kotagama must be upheld as a bequest of private property in the absence of evi-

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dence to the contrary. The bequest in favor of Karewilagala is made in the form in which private property would be bequeathed by a priest. It is in the same language as that which was used in the devise to Paepole and Pitiyagedere of lands which in 30879, D. C. Kandy, were proved to be private lands; and the devise thereof was upheld. There do not occur in the will the words "in charge" or 'in trust' on which so much stress was laid in the judgment in appeal in 9040, D. C. Ratnapura, as denoting that the lands were temple property. The devise being followed by long possession, the onus of proof that these were temple lands lay on the defendant, who alleged that Kotagama had no power to deal with them by his last will. The original title has always been established in evidence in like cases: 366, D. C. Kurunegala; 9040, D. C. Ratnapura; 27058, D. C. Galle. But the learned District Judge assumed the lands to be Temple lands, and therefore, in the absence of evidence, his decision must be set aside. [CAYLEY, J. Kotagama's succession to his tutor, and the appellant's succession to his tutor suffice to shew that the lands pass by succession and are therefore temple lands.] Assuming his tutor to have died intestate and without granting him a deed of gift the appellant would succeed. [CAYLEY, J. No. His lay heir would become entitled.] The question on the pleadings is the right of the appellant's tutor and not the right of the appellant under him. Secondly, assuming the lands to be Temple lands, Kotagama had the right to bequeath them to his fellow pupil. The 1st defendant has failed to support his contention that the succession is regulated by *Gnati-sisiya-paramparawa* or *Siwuru-paramparawa* (as the succession by relationship is termed in 366, D. C. Kurunegala:—Service Tenures Commission Report for 1871). The law as to *Sisiya-paramparawa* is thus laid down by the priests of Malwatte Wihare, as approved by twelve Kandian chiefs on the 5th January, 1832. "The lands, Wihare, &c., belonging to Bhikshu (or Upasampada, priest) will, although he had (so many as) five pupils, devolve solely to that pupil to whom an absolute gift was made thereof, and that pupil alone of the said donee will afterwards succeed thereto who received a regular gift of the same from him. The uninterrupted succession of pupils in this manner is termed *Sisiya-paramparawa*. Should the priest, the original proprietor declare his bequest common to all his five pupils, they will all become entitled thereto, and one of them being elected to the superiority, the other four may participate in the benefits; the said superior being dead, the next in rank will succeed to the superiority, and along with the rest (of the survivors) will enjoy

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the benefits. This order having subsisted, the last survivor will enjoy the benefit, and have the power to make a gift in favor of any other person. But the original proprietor-priest may transfer his rights to any other person he may choose, passing by his own pupils. In the event of the original proprietor dying intestate, the priests who happened to be assembled (at his death) become entitled in common. Things which belonged equally to two priests devolve wholly to the survivor." In these three rules, the rule as to succession to temple lands is laid down in a three-fold division, viz. (1) where gift is made to one pupil, (2) where the bequest is common to all pupils, and (3) where the rights are transferred to a stranger to the exclusion of all the pupils. Inasmuch however as the gift can be made to all the pupils or to a stranger, it follows that a priest while he has authority to do so (9040, D. C. Ratnapura) is not bound to select one pupil or indeed any pupil as his successor. It is sufficient if the object of his selection be a priest. In 51118, D. C. Kandy, it was held (per *Cayley*, D. J.) that a priest who has no pupils of his own can nominate as his successor a pupil of his fellow-pupil, as being one in the same line of pupillary succession; and referring to these laws of the Malwatte priests, it was there stated by the District Judge,—" the words are general, and I do not see how they can be made to apply to the incumbent's own pupils only." Accordingly, I submit that it was competent for Kotagama to bequeath to his fellow pupil to the exclusion of his own pupil, the respondent. [CAYLEY, J. It has always been the accepted rule of law in this Court that when once a gift was made by a Sannas or otherwise of lands for the purpose of future priestly succession by *Sisiya-paramparawa*, the original proprietor-priest might indicate the person through whom the line of succession was to pass, but that thereafter the succession was always to continue therein strictly limited to the pupils of each successive incumbent.] No such conditions are stated in these rules to have been ever imposed by the Kings or other donors, and as " the original proprietor priest" had absolute powers of selecting his successor, to whom he transferred all his rights, each succeeding proprietor-priest received the same rights as belonged to the original proprietor-priest without limitation, and could dispose of them at his pleasure to any other priest, especially if the latter were a co-pupil. [CAYLEY, J. The enforced limitation of succession to a priest's own pupils has never been questioned previously to this, and as it has always been accepted and acted upon, our judgment must be given in accordance with it.] Thirdly, the defendant having in 1845 failed to prove the invalidity of the testator's will

in 18401, cannot be permitted now to question the validity of the bequests therein contained. This point was raised and decided in the affirmative in 38790, District Court, Kandy, against the present defendant who took an appeal therefrom. The decision was not set aside in appeal although the case was heard and remitted for further hearing on affidavits of fresh merits. Fourthly, prescription is against the defendant and establishes the genuineness of our claim. The non-receipt of 18401, District Court, Kandy, by the Supreme Court in 1859—not till 1872—and the production of the will in Kandy in 1864, prove that the defendant must be regarded as having abandoned his appeal shortly after 1855, the date of the last order in the case. Rekowa, one of his own witnesses, proves that the appellant's managing priest, Nungomue, refused to let him into possession in 1860, and when Ratempola was ejected in 18218, D. C. Kurunegala, (to which the appellant was not a party), the headman in 1867 reported to the Fiscal that Nungomue had then been in possession for 18 or 19 years, and resisted the execution of the writ. [Cayley J. The evidence of prescriptive possession should be far stronger in a case of this kind, but it is doubtful whether prescription could give a title to such a case of a trust. The ruling we have made however as to the necessary pupillary succession is conclusive against the appellant.]

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Ferdinands and *Grenier* for respondent were not called upon. Judgment affirmed.

Tuesday, 7th July.

On the conclusion of the day's work, *Browne* drew the attention of the Court to a decision he had since last Court day found cited in the judgment given by the District Judge in 9040, D. C. Ratnapura, as follows:—"The Malwatte priests went further than their brethren of Asgiriya and stated that an incumbent might even lease to stranger priests not his own pupils. This has however been declared to be bad law by the Supreme Court. The point was raised and fully argued in the District Court of Kurunegala, and after examining disinterested old and learned priests and referring to this case No. 366, the Court held in case No. 15051 (hereto annexed) that an incumbent might even bequeath his trust to a co-pupil or brother scholar (they all belonging to the original sacerdotal line of pupils) to the exclusion of his own pupil, but not to a stranger priest, and that judgment was affirmed by the Appellate Court." The present case had passed the seal in the Registrar's Office, but having regard to the interests involved, the decree migt be regarded as a

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case of a judgment *quia improvide emanavit.* He moved that their Lordships should direct that the case should be sent for and further argued, in order that judgment might be given in accordance with the law previously laid down. [STEWART, J. You can have our judgment reviewed for the purposes of an appeal to the Privy Council.) The value of the property is considerably under Rs. 5,000, and we shall have to petition the Privy Council for leave to proceed further. (CAYLEY, J. We cannot regard this as case in which our judgment should be recalled *quia improvide emanavit,* and you must proceed if at all in the usual way.]

July 14.

Present STEWART and CAYLEY, J. J.

Executors. Security.

D. C. Colombo, 3795. The executors in this case having been noticed to attend Court and file final account, the following order was made by the District Judge.

" With respect to the provisions in the will for carrying on the business with the funds of the estate, if this is to be given effect to, it will be necessary for periodical accounts to be filed, and for these and the business books and stock accounts to be audited and reported on by a competent person. It will further be necessary for the executors carrying on the trade to give security for the value of the estate, excepting (for the present and subject to future consideration) the value of the immoveable property and moveables stated to be in the house and in possession of the widow. Deducting these, the estate is inventorized as follows :—

Moveable property in Colombo—apparently stock in trade	Rs. 7751	50
Goods received from London	13192	50
Debts due to deceased	7541	15
Moveable property in Kandy	166	0
	28651	24
	Say 30000	0

It is therefore ordered (1st) that the executors give security forthwith for Rs. 5000 (being less than the usual amount required from Administrators, which is double value; (2nd) that Mr. (the parties will suggest a name for the approval of the Court) be appointed to report as to the state of the

Executors. Security

business and the expediency of carrying it on for the benefit of the heirs; (3rd) a separate account of the trading business, with a balance sheet and stock account, to be filed every six months and business books to be audited by a competent pesson; (4th) that a separate detailed account be filed every three months of the receipts and payments and rents from immoveable property; (5th) that a separate account be filed every three months showing the state of the account with the Loan Board; (6th) that all the property, save the stock in trade and immoveable property, be forthwith sold and an account of the proceeds filed; (7th) at the close of each period of six months, the executors will also file a periodical *general account* (provisional) of their intromissions with the estate. The first of each several periodical accounts is to be filed on the 1st July next."

In appeal, (*Ferdinands* for appellants, *Grenier* for respondent) per STEWART, J.—"Set aside in so far as the order requires the executors to give security and directs the appointment of a person to report on the state of the business and the expediency of carrying it on. In other respects the order is affirmed. Executors derive their office from testamentary appointment, and being in this respect very different from Administrators, security ought not to be required from the former, unless special circumstances arise to render such a precaution necessary. 'The selection of executors by a testator,' as remarked by Sir C. Marshall at page 6 of his book, 'denoted a degree of confidence in their integrity which would render it superfluous to demand security from them except in extraordinary cases.' Besides, if the executors be unable or unwilling to furnish the required security, (no sufficient cause existing for recourse to such a measure) the estate would needlessly be deprived of the services of the very men chosen by the testator for carying out the trust. It will be seen on reference to the present will that, in addition to other provisions, by the 8th clause the executors are required to carry on trade as heretofore carried on by the testator in the shop in the Pettah for four years, or in the exercise of their discretion to wind up the business. Where so much confidence has been reposed, it is obvious that the Court should be cautious how it interferes. In the present case there is no affidavit charging the executors with any misconduct or maladministration, not even any allegation throughout the proceedings of any impropriety on their part, save the inference to be drawn from their being in default with the account, which was due for the first time on the 10th April of this year. On the 15th May, it was ordered that the executors be 'noticed

Executors. Security. to attend Court on the 29th May, and file final account.' But this notice was not served until the 27th May, only two days before the account was due, and on the 29th, the first appearance of the executors before the Court after their first default, the order now in question was made. Under the above circumstances, the Supreme Court does not consider that security should have been required from the executors, nor does this Court think that the delay, in itself comparatively not very great, was of that protracted, gross or persistent character to raise a presumption of misconduct or maladministration. Should, however, any misconduct on the part of the executors be hereafter made to appear or continued negligence established or other circumstances occur which may make it necessary for the Court to interfere in the interest of the heirs or legatees or creditors, it will be open to the Court to make such order as the exigencies of the case may call for, whether as to security or otherwise. The first of the accounts ordered not to be due until the 1st August."

August 8.

Present MORGAN, Acting C. J., STEWART and CAYLEY, J. J.

Acting Chief Justice, Q. A. and D. Q. A. sworn in. The Hon'ble SIR RICHARD FRANCIS MORGAN, Queen's Advocate, produced in Court a warrant under the hand and seal of His Honour the Hon'ble ARTHUR N. BIRCH, Administrator of the Government of the Island of Ceylon with the Dependencies thereof, bearing date the 8th day of August instant, appointing him, the said SIR RICHARD FRANCIS MORGAN, Acting Chief Justice of the Supreme Court of the Island of Ceylon, in place of the Hon'ble SIR EDWARD SHEPHERD CREASY, Chief Justice, absent in England on leave.

The said warrant was read and filed.

The Hon'ble SIR RICHARD FRANCIS MORGAN thereupon took the oaths of office and allegiance, which oaths were administered by the Hon'ble CHARLES HENRY STEWART, Senior Puisne Justice.

Mr. LOVELL BURCHETT CLARENCE, D. Q. A., was sworn in as Acting Queen's Advocate, and Mr. LOUIS NELL as Acting Deputy Queen's Advocate for the Island.

September 11.

Present MORGAN, C. J. and CAYLEY, J.

Sequestration. *D. C. Chilaw*, 20437. The plaintiffs claimed to be the owners of a land called Alegappen Totem, and, alleging that

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the defendants had taken forcible possession of a portion thereof, of the value of Rs 15,000, prayed for a decree of title, and that, *pendente lite* the issues, rents and profits, (which they valued at Rs 100 per mensem) might be sequestered, "as the defendants would be unable to make satisfaction for the same." A writ of sequestration having issued, under security given by the plaintiffs to the extent of Rs 1,200, the defendants moved that the sequestration be dissolved on their finding security to a like amount. The motion was allowed by the learned District Judge (*Wragg*)in the following terms: "In the circumstances of the case, it is ordered that the sequestration of the issues, rents and profits of the trees and soil, allowed on May 27th last be dissolved on the defendants giving security for Rs 12,00, this being the amount for which plaintiffs gave security when they obtained mandate of sequestration. Clause 4 of the Schedule annexed to Ordinance No. 15 of 1856 provides for two kinds of sequestration: one, a sequestration of the property of every description, of a defendant, if the Court be satisfied that defendant is fraudulently alienating his property and that plaintiff possesses no adequate security to meet his claim; the other, a sequestration of the issues, rents and profits thereof (i. e, of houses or lands) if the Court be satisfied that defendant will be unable, should judgment go against him, to make satisfaction for the said issues, rents and profits. The proviso affects and controls both kinds of sequestration, and the words 'the value of the property sequestered' must be fixed by, and construed with reference to, that sequestration which has been moved for and obtained in the case in which argument arises. In the present case, plaintiffs moved for and obtained a sequestration of the 'issues, rents and profits' and gave seccrity for Rs 1,200, the probable value of one year's issues, rents and profits. Plaintiffs appear to have themselves fixed this amount as the probable value, and the Court has no reason to doubt the accuracy of plaintiff's valuation, and defendants are entitled, on giving the same satisfactory security, to a dissolution of the sequestration obtained by plaintiffs."

The plaintffs appealed, asking that the defendants be required to give security for the full value of the land in dispute, and urging the following grounds in their petition. "That the construction put by the Court on the 4th and 5th clauses of the Ordinance No. 15 of 1856 is erroneous. The security that the plaintiffs are to give is for costs and damages consequent on the sequestration being issued, and not the value of the rents and profits, as these are not taken by the plaintiffs but preserved

Sequestration. under sequestration for the benefit of the party eventually successful. The security on the contrary that the defendants are to give to release such sequestration (and thereby get into their possession these rents and profits) is to be 'equal to the value of the property sequestered.' That consequently to require the defendants, only to give the same security is injurious to the plaintiffs' interests. The case may last several years, and the property deteriorate in value in the meantime, through the neglect of the defendants, and consequently they should be called upon to give full security, at least for all the mesne profits pending action with a suitable amount superadded to compensate the plaintiffs for the probable deterioration of the property as well. Indeed, the words of the rule strictly construed compel them to give security for the value of the property itself, which will embrace the mesne profits."

Per MORGAN, C. J.'—Affirmed. The construction put upon the Ordinance 15 of 1856 by the District Judge appears to this Court to be correct. In the event of the case pending more than one year, without any default on the part of the plaintiff, liberty is reserved to him to apply again for additional security."

September 15.

Present CAYLEY, J.

Arbitration. *D. C Batticoloa*, 17197. After the examination of the defendant in the Court below, the case, with the consent of parties, was referred to the arbitration of two persons with leave to them, if need be, to choose their own umpire, the award being ordered to be filed on or before the 12th March. Subsequently the time allowed to the arbitrators was extended, and the award was sent in on the 21st April; but the District Judge (*Worthington*) refused to make the same a rule of Court for the reason set forth in the following judgment. "The award must be rejected on the ground that the proceedings handed in with it are incomplete, the evidence of 30th March being oral only, although it would appear before the face of the award itself that the arbitrators had not come to a decision prior to that day. The Court is aware that the Hon'ble the Supreme Court has held that written proceedings are not absolutely necessary, but surely if written proceedings be handed in, it is essential that they should embody the whole evidence upon which a decision has been arrived at It is impossible otherwise for the Court to carry out the provisions of the 26th and 27th clauses of Ordinance 15 of 1866."

In appeal, *Grenier*, for appellant, relied on the ruling of the

Appellate Court in D. C. Colombo, 54428, II. Grenier, (D. C.) 18. Arbitration.

Per CAYLEY, J.—" Set aside and judgment ordered to be entered in terms of the award. It is no doubt the proper course for arbitrators to take down in writing the material parts of the evidence adduced before them, but a failure to take down some particular part of the evidence does not necessarily amount to misconduct, and certainly such is not shewn to be the case in the present instance. It is only in the case of misconduct or corruption on the part of an arbitrator that the District Judge can set aside an award. See section 27 of Ordinance 15 of 1866."

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Landlord's lien.

D. C. Colombo, 63677. The defendant in this case had been the tenant, under a lease of the claimant and appellant who in case No. 63695 obtained judgment on the 2nd December, 1873, for arrears of rent due for July, August, and September 1873. On the 27th October, 1873, the present plaintiff and respondent obtained judgment against the defendant for Rs. 1000 and interest on a mortgage bond, and on the 27th November following, levied execution on the mortgaged goods lying in the appellant's house tenanted by defendant. Out of the proceeds of the Fiscal's sale in deposit, the appellant (who had been paid the amount of his judgment) claimed Rs. 140. as rent due for October and November, and further rent at Rs. 50 per mensem. This claim the learned District Judge (*Berwick*) dismissed in the following terms. " A landlord has no preference for house rent over other creditors, except under the Insolvency Ordinance. What he has is a lien or power of detention over the *invecta et illata* before they are removed. After this removal, he has no lien. And at no stage has he any claim over the proceeds of a sale of them, unless the sale has been agreed to be without prejudice to the benefit he would have derived, a case that sometimes has happened by special arrangement in order that the sale might not be delayed, pending litigation as to the right of lien."

In appeal, (*Ondaatje* for appellant) per CAYLEY, J.—" Affirmed. The claimant did not perfect his inchoate hypothec by seizure, so as to acquire the landlord's privilege of preference over a prior mortgage."

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September 18.

Present CAYLEY, J.

D. C. Trincomalie, 21013. Under the order of the Court below referring the case to arbitration, the umpire had been empowered to act only in case of any difference of opinion Arbitration.

Arbitration. between the arbitrators; but he assumed the place of one of the arbitrators who had retired from the arbitration, and with the other signed the award, which the District Judge properly refused to make a rule of Court, remitting it for amendment.

In appeal, (*Ferdinands* for appellant, *Clarence, Q. A.*, for respondent) per CAYLEY, J. "Affirmed. In this case an objection to the legality of the award is apparent in the face of the award; and consequently, under the 26th section of Ordinance 15 of 1866, the District Júdge has power to remit the award. The award is signed by one arbitrator only and by the umpire. If one of the arbitrators has refused to act another should be appointed under the provisions of the 16th lause of the above Ordinance."

Execution. Sale set aside. *D. C. Galle*, 20735. This was an appeal against an order of the District Judge (Roosmale Cocq) confirming a sale in execution, which was impeached as irregular, chiefly on the ground that the land sold had not been advertized in the *Gazette*. although it was worth more than Rs1,000. The case was argued by *Grenier* for appellant, the respondent being unrepresented.

Per CAYLEY, J.—"Set aside and sale disallowed. This Court thinks that it is proved that the value of the property sold exceeds Rs 1,000. It was purchased for Rs 1,590, and one of the bidders says that he would give Rs 2,000 for it now, but that he was deterred from bidding by the false statement of the purchaser that the latter was buying for the execution debtor. There is no evidence that the property is worth less than Rs. 1000, except that of Abdul Casim, who states that the land is not 'worth a pice,' a statement on which no reliance can be placed. The want of publicity in a case of this kind, where some of the bidders appear to have been deterred from bidding by the above false statement of the purchaser, would manifestly cause substantial injury to the execution debtor. The appellant is however to blame for not seeing that the sale was properly advertized, especially as it had been several times previously stayed at his own request; and he must pay his own costs."

Practice. Security Bond. *D. C. Batticaloa*, 17206. A warrant in mesne process having issued, the defendant with two sureties executed, on the 30th November, 1872, in favor of the plaintiff, a security bond, conditioned as follows: "if defendant do answer the claim of the

plaintiff and shall pay any sum or sums of money awarded by Court, and shall abide by and perform the judgment of the said Court, or shall surrender himself or be surrendered by his bail to be charged in execution, then this bond to be void; otherwise to remain in full force." Judgment having subsequently been entered by consent in favor of the plaintiff, his Proctor moved for a notice on one of the sureties to shew casue why writs should not issue against his property in satisfaction of the judgment, as the defendant had left the island leaving no property seizable in execution. Cause having been shewn on behalf of the security, the learned District Judge (*Worthington*) held as follows: "On the authority of Voet, 2, 8, 17 and Morgan's Digest, 60, 61, the Court decides the plaintiff cannot be allowed his remedy in this case, there being no precedent in the practice of the District Court."

Practice. Security Bond.

In appeal, (*Ferdinands* for appellant) per Cayley, J.—"Set aide and case sent back for further hearing and consideration. It is the practice in the District Court of Colombo, when security has been given for the performance of a judgment, to allow the liabilities of the sureties to be determined in the same case in which the judgment has been entered against the principal, without requiring the plaintiff to commence a fresh action; unless it is shown in any particular case that such a course would be manifestly inconvenient or prejudicial to the interests of the sureties. This practice, which is sanctioned by Voet (II, 8, §. 17.) and referred to, as a common one, by Sande (Dec: Fris: III, tit. 10, def. 3) should be followed in the other Courts of the Island, as it tends to prevent unnecessary delay and expense. Full notice must, of course, be given to the sureties, and the proper course is to apply for a Rule against them. In certain cases it may be advisable to refer the plaintiff to a fresh action, but in the present instance no valid reason has been shewn for adopting such a course, and there is nothing to prevent the sureties availing themselves in this case of any defence they may have, in as full and effectual a manner as if a separate action were brought against them. As the practice in the Batticaloa Court has hitherto been different, parties will bear their own costs respectively."

October 6.

Present Morgan, C. J. and Cayley, J.

D. C. Jaffna, 2389. The respondent in this case, who was in jail under a civil writ, having been adjudged an insolvent applied for his release under the provisions of the 36th clause of Ordi-

Insolvency. Discharge.

Insolvency. Discharge.

nance 7 of 1853. This application was objected to by one of the proved creditors, on the ground that the insolvent had committed a breach of trust in case No. 20139 under the judgment in which he was now in custody. The acting District Judge (*Thwaites*) however allowed his discharge in the following terms: "I do not think that the Ordinance refers to anything in the form of *constructive breaches of trust* and construed strictly. The case No. 20139 is brought by one Sithambram Chetty for the cancellation of an alleged fraudulent deed and for the payment of a certain sum of money, the value of a ship parted with by the insolvent *possibly* illegally, but which vessel nevertheless came into the defendant's and now insolvent's hands, under an acknowledged deed and with the consent of plaintiff in that case. I cannot find it in me to hold that the 'debt' for which the insolvent is now in prison is a debt '*contracted by fraud or breach of trust*,' for it is a debt contracted by reason of incompetency to repay the value of the vessel which came into his hands lawfully and fairly, but which he parted with illegally though in good faith."

In appeal (*Ferdinands* for respondent) per CAYLEY, J.—"Affirmed. The appellant has not thought it fit to appear in support of his appeal, and this Court is not satisfied that the debt was contracted by such a fraud or breach of trust as is contemplated by the Insolvency Ordinance as to consider that the order of the District Judge should be interfered with."

Insolvency. Rehearing of Certificate.

D. C. Kandy, 522. In this case a secured creditor, (*J. R. Bell*) who had not proved, applied, under the 133rd clause of Ordinance 7 of 1853, for the re-hearing of the certificate which he alleged had been fradulently obtained by the insolvent (*Gooneratne*); and as explanatory of his delay in proving, the applicant alleged—

"that being secured to some extent he could not prove his claim and take part in the insolvency case, owing to his security not having been realized; that he was not in a position to realize the same, owing to the Assignee of the insolvent estate of the debtor having brought an action in the District Court of Colombo impeaching his (the applicant's) security which case was not decided in appeal till the 16th December, 1873; that in the meanwhile the insolvent obtained his certificate on the 28th November, 1873; and that the applicant has realized a portion of his security and the writ of execution is now in the hands of the Fiscal to realize the remainder."

The application was allowed on the 12th May, 1874, but subsequently, the insolvent having filed an affidavit that he had not been served with a notice of the motion for a re-hearing, the

APPENDIX.

HOEWANDIRAM.

(From the Legal Miscellany.)

Whilst all questions of Ceylon tenure are likely to attract the general reader, since they call to mind the system which has so many romantic associations and which, with many complications, is still interwoven with law in Europe, the agricultural customs of this country, though exercising an every-day influence on the material well-being of the people, are less attractive. The researches of SIR JOHN D'Oyley and Mr. Sawers have collected all that is required with respect to the interesting Service Tenures which prevailed throughout the Kandyan Provinces from ancient times. There is a connected field of enquiry which will perhaps present equally new, if not such extensive and comparatively interesting results.

The following notes of a very ancient and valuable custom, connected with Agriculture, are offered to the readers of the LEGAL MISCELLANY as an instance of what may be picked up at outstations. The custom known as *Hoewandiram* is ancient, and the following cases describe it in the peculiar form in which it exists in the Girriway-pattoo. They may prove useful to the legal profession in Ceylon, as illustrating similar questions in other parts of the island.

Sir Charles Marshall, in his article on "LAND," has not failed to notice the subject; but in the Hambantotte case cited by him, the Supreme Court did not pronounce any decision on the validity of the custom, and he could not include the cases which I shall attempt to report in this communication, as his valuable work extended only to March, 1836. The passage in *Sir Charles Marshall* is as follows:—

" In the following case, the right of headmen to exact the due
" called Hoewandiram in the Southern districts came in ques-
" tion: and though from the circumstances under which the
" case presented itself, the S. C. was not called upon to decide
" upon that right, as a general question, it may be useful to
" state the view taken of the subject as it stood. The plaintiff
" sued the defendants, who were headmen, for the value of cer-
" tain paddy received by them as headmen in September 1831
" and May 1832 under the designation of Hoewandiram, no such
" due being reserved in the deeds by which the plaintiff held

"his lands; it appeared from the pleadings that the plaintiff "had at first refused to pay this demand, on which the defend- "ant complained to the Collector, Mr. Mooyart, who ordered "the plaintiff to pay. And the plaintiff stated in his replica- "tion that he considered the order illegal, and that he might "have persisted in his refusal, but that he had paid it as a "matter of courtesy, knowing he could recover it back. It "was proved in evidence that the Hoewandiram was paid on "some of the lands in the district, and not on others. And "*Mr. Mooyart*, who in the meanwhile had been promoted to "another office, stated in evidence that he considered the demand "decidedly just. On this evidence, the D. C. gave judgment "for the Defendants. The S. C., on appeal, affirmed this "judgment, but with the following observations: "In record- "ing this affirmation, the S. C. is anxious to have it understood "that the right of Headmen to levy the duty or tax called "Hoewandiram, is, on the one hand, neither established, sanc- "tioned, or recognized, nor, on the other hand, in any way "affected thereby. This right may possibly exist, but if the "claim of these defendants, to retain the amount paid to them "by the Plaintiff, had rested solely on their right to exact it, "this Court would certainly have required fuller and more sa- "tisfactory evidence of the customs or law on which such right "was founded, and of the consideration which, it must be pre- "sumed, is received in some shape or other, by those who pay "the tax. The present decision goes entirely on the principle "that when a man pays money voluntarily, and it is impossible, on "the evidence now before the Court, to say that the Plaintiff "did it by compulsion—he cannot recover it back, merely on "the ground that the parties receiving it could not have en- "forced their claim in a Court of law: No. 58, Hambantotte, "22nd December, 1834."

Since this custom was thus brought to the notice of the Supreme Court, several cases arose in the Tangalle District. Of these I have seen the following: D. C. 169; D. C. 947; D. C. 1157; and D. C. 1266. In the first and last of these the question was decided by the Collective Court, and the first must be considered the leading decision. In it the Libel stated that the duty of Hoewandiram had been, from time immemorial, unquestionably paid as a lawful impost to the Mayoraals, as a perquisite for the assistance rendered by them in furtherance of cultivation, but that the above Defendants had forcibly and without any right appropriated 10 amonams, 3 pellas, and 8 kooroonies of paddy from the produce of eight fields in the Libel stated.

The Answer of the Defendants, taken down by the District Judge from their verbal statement—(after pleading that they were joint owners of moieties only of the fields mentioned, excepting one of them of which the Defendants claimed only a

third share)—proceeded to take issue as follows:—
"We formerly paid the customary perquisite of Hoewandiram "to the local headmen in consideration of the care and attention bestowed by them on the cultivation of our said lands, "that is to say, two kooroonies of paddy to the Vidhane and "eight kooroonies to the Kariyakoranno or Mayoraals, for every "amonam's extent of land; but since the Mayoraals have ceased "to render the usual aid and superintendence and have not done "anything for the benefit of our cultivation, we have withheld "the perquisite of Hoewandiram from them, that is, the "Mayoraals 8 kooroonies per amonam: but we have hitherto "duly paid the 2 kooroonies per ammonam to the Vidhane, as he "still assists us in the way of superintending the cultivation of "our said lands. On the ground of the Plaintiff having rendered "us no assistance whatever for these two years, either at seed "time or harvest, we decline paying him the perquisite claimed; "and we are moreover justified in withholding the Hoewandiram "under the sanction of certain decisions by the District Court of "Matura, whereby the claim for Hoewandiram on the part of "the Mayoraals was effectually disallowed in that District. How-"ever, if the Mayoraals should again render their aid to have "our lands properly irrigated, and otherwise assist us in the "cultivation of our lands as heretofore, we will not insist on the "aforesaid decisions of the District Court of Matura, but will "pay them their share of Hoewandiram, eight kooroonies of pad-"dy for every amonam of our paddy land under cultivation. In "fact we have paid ten kooroonies per amonam for the last two "years, to our Goyas, because they were put to extra trouble "in cultivating our said lands in consequence of the dereliction "of the Mayoraals as above stated."

In replication, the Plaintiff pleaded that, as the Defendants had the sole management of the fields, and had appropriated the perquisite of Hoewandiram, the action was properly brought against them. The Plaintiff further pleaded that he had never departed from rendering the customary assistance, and that had he done so, it was the duty of the Defendants to report his neglect to the superior headmen, or the Government Assistant Agent, but that the defendants could not withhold the usual Hoewandiram or divert it as they pleaded they had done. It was also pleaded that the Matura decisions referred to were no authority in the decision of the question before the Tangalle Court.

The case was tried on the 3rd of September, 1836, and the Assessors agreed in considering that the Hoewandiram was a tax sanctioned by long established usage, and that from the time of the Dutch government, the Mayoraals regularly received it as their due from the land-owners, and that Judgment should, therefore, be given for the Plaintiff.

Mr. J. Armour, the District Judge, differed from the Assessors, and was of opinion that the Hoewandiram ought not

to be reckoned as a gratuitous contribution: that a Mayoraal ought first to *earn* and *deserve* such perquisite to become fairly entitled to claim it, and that as the Plaintiff had not only neglected to assist the Defendants to cultivate their lands in 1835, and since, but had even wilfully exposed their crops to damage, he had, as Mayoraal, forfeited all claim to Hoewandiram for the two last crops of the lands in question. The Plaintiff's claim was accordingly dismissed with costs.

The Plaintiff appealed on the following points connected with the custom. 1.—That it had been well proved that the lands could not have been cultivated at all, if not for the dam of which the Appellant had charge, which had been first erected under the orders of the Modliar of the Girriway Pattoo and subsequently repaired by the Appellant at his own expense. 2.—That the duty of the Mayoraal was not to furnish the cultivators and land proprietors with every thing required for cultivation; but to take care of such dams, canals, etc. by which the irrigation of the lands was secured, to cause fences to be erected by the different land-holders and cultivators, to procure seed paddy, and cattle if required and called for, to inspect and estimate depredation to the crops, and perform other services not enumerated. That for the purposes of the harvest in question, not more was required than to keep the dam in order, which was done. 3rd.—That no complaint was ever made by the defendants to the Modliar of the Pattoo or to the two Vidhane Aratchies of division, of neglect on the part of the appellant, and that this was the proper course to have been followed by the defendants. 4th.—That the two witnesses called for the defence were natives of Ahangamme in the Galle District, its distance from the lands in question being 50 miles. It was also pleaded that the custom of the Girraway Pattoo systematically differed from that in all other districts.

The appeal appears to have been heard in Tangalle, on circuit, and the Supreme Court made the following order: "The proceedings in this case having been read and explained "by the Court to the assessors, it appears the plaintiff by his "libel claims a certain retribution or duty called the Hoewandi-"ram consisting of ten Koornies per amonam of paddy, which "he states is due to him as Mayoraal from his being charged "with the superintendence of the grain cultivation of the dis-"trict. He alleges that this right has existed from time im-"memorial as a retribution fee—the Mayoraal being charged "with various duties, among others with supplying grain, cat-"tle and labourers at an established remuneration, to the culti-"vators when wanted, and also for his being subject to a heavy "responsibility, that officer being obliged to keep the dams and "water-courses, necessary for the indispensable purpose of ir-"rigating and submerging paddy lands, in constant repair at "his own expense and to see that the water is properly distri-

"buted. The defendants' reply is three-fold.—There is no "such custom.—If it did previously exist, it must be considered as having been abolished with the abolition of forced "labour.—The Plaintiff has neglected his duty and consequently forfeited his right for the two harvests claimed. The last "point is so very secondary in importance as compared with "either of the former, that as both parties have agreed to call "the attention of the Supreme Court particularly to these, it "will only observe that were that the only question for consideration, the Court would feel inclined to take the same view "of the case that the District Judge has done. Proceeding to "the second point. By the Order in Council of 12th April, "1832, it was enacted that "none of His Majesty's Native or "Indian subjects within the said Island should (thenceforth) "be or were liable to render any service to His Majesty in respect to the tenure of their land or in respect of their caste or "otherwise to which His Majesty's subjects of European birth "or descent were not liable." The remaining clauses of that "Order are evidently merely inserted to give full effect to this "important enactment and as explanatory of its principle. "How, therefore, this regulation can bear upon the claim now "before the Court does not appear. The Order in Council has "reference to personal service: this action to a money payment. "The order exempts from service to the *Crown*: this is claimed "as the perquisite of the *Officer*. The Order relates to service "exclusively due by Natives and Indians: this duty would be "alike due by all holders of Paddy-lands, whether Natives or "Europeans. Finally and especially the Order in Council was "intended to exempt from the gratuitous performance of service to the public. This is a remuneration for duties rendered and for a responsibility incurred for the protection and "benefit of the debtors. Nor is it because when compulsory "labour was due by the rural population, these officers had to "superintend and direct the labourers, on which occasions they "may or may not at Ceylon, as throughout the East under "Native rule, even to Persia, have turned these powers to their "own profit, that their rights, privileges and emoluments on "the one hand and their liabilities and responsibility on the "others arising from a perfectly different description of duties, "can be relinquished or considered as directly or inferentially "abolished by the law which removed that particular grievance. "It remains, therefore, to consider whether any continued "usage or practice having all the requisites of a legal custom "exists with regard to the Hoewandiram, and for this purpose "the case is referred back to the District Court of Tangalle to "take evidence as to such custom, with directinos to enquire "particularly respecting the origin, nature and amount of the "Hoewandiram and the various duties and responsibilities of the "Mayoraals (or other Officers who claim to be entitled to a

"share of this remuneration) towards the cultivator. The "District Judge will report his opinion fully on the points re-"ferred to him."—(*Tangalle, 27th March.* 1837.)

The case was reheard on the 2nd October following, and *Mr R. Exshaw Smith* expressed his opinion as follows: "The "Acting District Judge has endeavoured, but in vain, to arrive "at any positive conclusion as to the origin of the Hoewandi-"ram tithe. It certainly appears to be one of a very ancient "date. The first witness heard this day, a person advanced in "years, states, that his grandfather enjoyed it to his knowledge. "The nature of the tithe is in the opinion of the District Judge "in many points good. It ensures to the cultivator everything "necessary for cultivation, yet, until the abolition of compul-"sory labor, there did exist an evil, namely, that the duty of "working at the dams was done by order and was compulsory. "The Acting District Judge is much of an opinion with the "2nd witness called this day (the Modliar of Matura and an "extensive landholder in the Girrawaypattoo) when he says "that unless the Vidhans and Mayoraals do their duty, he is of "opinion that they are not entitled to the Hoewandiram."

When the proceedings came back, the following decision was given. "The Court having fully and maturely consider-"ed the further evidence in this cause is of opinion that the "Hoewandiram is due and that if excessive, as it appears to be "in some districts, the Government alone could apply the "remedy. But the two years actually sued for, 1835 and "1836, are not recoverable by Plaintiff from Defendant on the "grounds stated by the District Court, Each party to bear his "own costs." This last decision, dated the 5th of March, 1838, is marked as a Collective decision of the Judges, *Sir William Rough* being Chief Justice.

As the decision in the Tangalle case, D. C, 1157, was ex-"pressly followed by the Collective Court in deciding the other "case D. C. 1266, it may be noted that in the former case the "decision of the District Court was recorded by Mr. Rabinel. "The assessors concur with the District Judge that, inasmuch "as no service appears to have been rendered meriting the cus-"tom (but not law) of Hoewandiram, the Plaintiff is not enti-"tled to it." (12th September, 1839.) But this was reversed "in Appeal, as appears by the following Collective decision. "The Court being of opinion that His late Majesty's Order in "Council abolishing compulsory labour in no way affects the "relative rights and duties of the Mayoraals or headmen, on "the one hand, or those of the cultivators of Paddy on the other, "which continue on the same footing as previously; and being "also of opinion that, if the Mayoraal neglected his duty the "cultivators should have complained at the time to his superior "headman, *as was proved to have been done in case* No. 169; the "decree appealed from is hereby reversed and the prayer of

"Plaintiff's libel adjudged to him without costs. It may be "that the Hoewandiram is in some districts excessive. It ap- "pears by the Kandyan Proclamation of 1818 that the "Petty "headmen's dues were fixed at 1-20th, but all these are mat- "ters for the consideration of the Executive Government." "(27th November, 1839.)

The District Court, in the case No. 1266, distinctly attempted to connect the custom with the abolished system of compulsory labor, probably considering (though it was not clearly expressed), that the Mayoraals had ceased to exercise that power which was absolutely necessary for them, before they could discharge their duty according to former custom and merit the payment of Hoewandiram on the same terms. On the 10th of December, 1839, Mr. Rabinel entered the following judgment in the case under notice. "The question of Hoewan- "diram, by the government Ordinance abolishing compulsory "labour appears a source of continual litigation:—the oppo- "nents to this fee or perquisite maintaining (and certainly on "apparently tenable grounds) that such fee emanating from the "power of demanding compulsory labour, must become extinct "when that authority is abolished:—and their further defence "is, that no extraordinary or compulsory work is caused to be "performed by the Mayoraals:—that they and the parveny "proprietors willingly assembled, for the periodical construc- "tion of the dams and clearing of water ways:—that the "Mayoraals themselves, besides being parveny proprietors of "lands benefited by this mutual work, hold other lands by "right of Mayoraalship, in compensation for performing govern- "ment duties, cultivated by those means, and consequently "they are the persons most benefited by it. Hoewandiram "being but a custom and not enforced or made law by govern- "ment; and appearing also in a great measure, a voluntary "contribution paid by those who are away from their lands, and "have entrusted them to the Mayoraals and other headmen for "cultivation: and this last conclusion is particularly appli- "cable to the *present* case, for the Plaintiffs have not adduced "any instance of receiving Hoewandiram, but from lands so "placed or from their own kin (interested parties); while the "witnesses for the defence directly depose, that they do and "have refused to pay this tax, it being abolished with the "power of demanding compulsory labour, and in the present "instance, no extraordinary work appears to have been perform- "ed or influence exerted. In this stage of uncertainty, and "particularly from the nature of the evidence produced by the "Plaintiffs, the assessors unanimously concur with the District "Judge, that the Plaintiffs are not entitled to Hoewandiram."

The appeal included the points that the Order in Council only exempted from personal services and that the decision in this case was contrary to that of the Supreme Court in No. 1157, a copy of which was annexed to the petition. The Supreme

Court entered the following order. "That as neither party ap-"pears by counsel, the Court until better advised follows the "decision in the case Tangalle No. 1157—therefore reverses the "judgment of the District Court and decrees the Defendants to "pay to the Plaintiff one ammonam and twelve kooroonies of "paddy or the value thereof, viz. eleven shillings and three "pence sterling together with all costs of suit." (30*th May*, 1840.)

On the 25th of January, 1839, *Mr. De Livera* had pronounced the following decision in case No. 947 from which no appeal had been taken ;—"It is admitted by the witnesses called by the defen-"dant, who declare themselves to be joint cultivators of the land "in question, that they jointly with the defendant opposed the "plaintiff and resisted the demand of the Hoewandiram payment, "on the ground that the government had issued an order not "to give the same. The ground of opposition is quite untenable. "It has been decided clearly by the Supreme Court that this "perquisite is justly claimable by the village headmen." Judgment was entered accordingly with the concurrence of the Assessors.

If we were to content ourselves with having thus laid before us the opinion of several experienced District Judges as well as of the Supreme Court, collectively met, we should probably have all that we require by way of precedent ; but the evidence of the Modliar of Matura, referred to by Mr. R. Exshaw Smith, and of another witness, gives an interesting account of the custom, and by quoting what they said we shall present the whole subject in as complete a form as possible.

"Dionysius Abraham Dissanaika, Modliar of the District of "Matura, sworn—Protestant. I am a Modliar of tho Matura "district. I have lands in the Girrawaypattoo to the extent of "more than two hundred acres. I know that Mayoraals are en-"titled to a certain perquisite called the Hoewandiram. I pay "that tax upon some of my lands, upon some I do not pay. "I pay upon Paraveney lauds, but lands which I bought from "Government I do not pay for, that right is reserved to me in "my title deeds. The Hoewandiram is a duty that has always "been paid upon Paraveny land until the last two years. I "have not paid it myself for the last two years and a half. The "reason I have not done so is, that there are several cases pend-"ing about this tax and I am awaiting the conclusion. If or-"dered to pay generally, I shall be happy to do so. I consider it "a useful tax. My best land of one amonam's extent will pro-"duce from ten to twelve or fifteen amonams. In the Girrawa-"pattoo the Hoewandiram is calculated upon the extent of the "field, in the Matura district upon the amount of the produce. "A field of one amonam's extent, the Hoewandiram share "would be ten Kooroonies. I never paid more. The duty of "the Mayoraals is to make dams, erect fences, to fix days upon "which grain must be sown, to order watch huts to be built.

"They must make reports upon trespass of cattle. All these "they are not to do, but are merely to give directions to the "proprietors and superintend the work. At times the Mayoraal "joins the proprietors in work. These things are all superin-"tended by the Vidhans, Mayoraals, and Modliar if he should "like to go; but the Modliar has no participation in the Hoe-"wandiram. I think if the Vidhans and Mayoraals did not "compel the inhabitants to work, the fields would not be pro-"perly cultivated. The inhabitants through idleness would "neglect them. If the Mayoraals neglect their duty they are "dismissed. I never knew of any dismissal. Suppose a dam to "have been constructed and during twenty years that it requir-"ed no repair, yet the Mayoraals are entitled to receive the "Hoewandiram. I am of opinion that if a Mayoraal *did not* do "his duty that he *is not* entitled to the perquisite of Hoewandi-"ram. The Mayoraal must receive the perquisite of office so "long as he remains in it. Formerly the Mayoraals and Vidhans "used to send a tom-tom about intimating, to the inhabitants "that a certain dam was to be constructed upon such a day and "at such a time, and ordering them to attend to construct it. "They used to come but received no remuneration whatever. "They were people who generally had lands in the vicinity. "Formerly if the inhabitants refused their aid they were punish-"ed by the Vidhans. Since the abolition of compulsory labor "the inhabitants are ordered by beat of tom-tom as heretofore "to attend. Some do and some do not. They know they cannot "be punished. If this tax is done away with my opinion is that "cultivation would be injured. On the other hand, I consider "the tax too high in the Girrawaypattoo. [*Cross-examined.*] I "cannot give any particular reason for the difference of the "Hoewandiram differing in the Matura District and the Girra-"waypattoo. About fifty acres of my land in the Girraway-"pattoo is "Parveny." The nature of the exemption in my "title deeds is that besides the 1/10 I am to pay Government, "I am to pay no other duty; I think the Hoewandiram is paid in "the Matura district in the fairest way. The owner of a field "must cultivate it whether he likes it or not, if he did not do so "the adjoining fields would be ruined, as it is impossible to "separate the fences distinctly or to repair the dams which con-"vey water one into another. I have been a Modliar since 1813. "I know the Girrawaypattoo well, to my knowledge I have "never known any money laid out for the benefit of cultivators "by the Vidhans or Mayoraals. The crops are thus divided, "1-10th to Government, 3-20th for seed, 1-40th Hoewandiram "share, 1-7th to the reapers and thrashers. The remainder, if "the soil is tolerably good, is divided into two between the pro-"prietors and cultivators. If the soil is very good the proprietor "generally gets more and the cultivator less. There are various

" duties which the Vidhans and Mayoraals have to perform be-" sides those I have mentioned. Those duties are for the " interest of Government. Many of the Mayoraals hold also " Divel lands, for these lands they pay 1.5th. They are private " property. I have no case myself nor any against me regard-" ing the Hoewandiram."

Another witness, Don David Saneratne Ratnaike, late Modliar of Magampattoo, spoke of the tax, as having existed time out of mind, that it was due by all land-holders, whose services were always at command. He then described it as follows. " The Hoewandiram " is calculated upon extent. If one amonam was sown to a field " and it brought one hundred, yet the Hoewandiram would only " be ten kooroonies. The crop is thus divided. Ten amonams " to Government. One amonam and half as seed. One seventh " of the whole to the reapers and thrashers. Ten kooroonies as the " Hoewandiram tithe. A small quantity is then given to the " cultivators as *alut bath*, "new rice," and the remainder divided " according to the nature of the soil between the proprietor and " cultivator." Further on he states that " when tho crop is " divided there is a portion set aside for cattle, that is for the " owners who lent them to plough." The witness knew of several Mayoraals and Vidhans who had been dismissed for neglect of this particular duty, and stated that on such neglect, the cultivators should represent to the superior headmen.

It is not necessary to go at greater length into the evidence adduced in description of the custom. It is evidently a very ancient one, and one which can be worked very beneficially in the interests of agriculture. The effect of the decisions of the Courts (which were sought about the time to which we have referred) seems to have been to confirm the state of things which had existed from time out of mind. This had been interrupted by the notion that had got abroad, that all right to claim Hoewandiram had ceased with the abolition of forced labour, since that system of compulsion had been very closely connected with this peculiar organization for the purposes of cultivation. There can be no doubt that the whole subject was fully investigated in the course of the proceedings, of which this retrospective report has been attempted ; and if this article is not very valuable in itself —it is hoped that the interest at present attaching to the great subject of Irrigation will lend it a value which may for the present make it acceptable to some readers.

Throughout the Matura district 1-48th of the gross produce is said to be levied as Hoewandiram tax under the provisions of the Paddy Lands Irrigation Ordinance, the Legislature having interfered in 1856 and 1861, for the better enforcement of ancient customs regarding the Irrigation and Cultivation of Paddy Lands throughout the Island.

LOUIS NELL.

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